Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate Dist., Div. 6

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank,* 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption:

- Petitioner Charles A. Pratt Construction Co., Inc. was the Plaintiff and Appellant below;

- Respondent California Coastal Commission was the Defendant and Respondent below.

Pursuant to S. Ct. Rule 29.6, Petitioner states that Charles A. Pratt Construction Co., Inc. has no parent corporation and no publicly held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Charles A. Pratt Construction Co., Inc. petitions for a writ of certiorari to review a final judgment of the Court of Appeal of the State of California, Second Appellate District, Division Six.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six is published at 162 Cal.App.4th 1068, 76 Cal.Rptr.3d 466, and is reproduced as Appendix A. The denial of rehearing is Appendix D. The opinion affirms a judgment of the Superior Court of the State of California for the County of San Luis Obispo, reproduced in Appendix B. The California Supreme Court's Order denying review (by a split vote) is reproduced in Appendix C.

JURISDICTION

The California Court of Appeal entered judgment on May 8, 2008, and denied a timely petition for rehearing (with a slight modification to the opinion) on June 9, 2008. The California Supreme Court denied review on August 20, 2008, although Justices Joyce

Kennard and Marvin Baxter voted to grant review.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment:

". . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Pertinent portions of the California Coastal Act, Cal. Pub. Res. Code § 30000 *et seq.* are reproduced in Appendix E.

INTRODUCTION

Two decades ago, Justice Stevens had this comment about the Court's takings decisions:

> "[E]ven the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." (*Nollan v. California Coastal*

Commn., 483 U.S. 825, 866 [1987] [dissenting opinion].)

Notwithstanding decisions since then, the Court has refrained from establishing clear, bright line rules. (*Palazzolo v. Rhode Island*, 533 U.S. 606, 617 [2001] ["we have given some, but not too specific, guidance"]; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326 [2002] ["we still resist the temptation to adopt *per se* rules"].)

Rather, the Court has held that — for almost all cases — the required process is the *ad hoc* factual analysis described in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) although, as the Court conceded recently "each [of the *Penn Central* factors] has given rise to vexing subsidiary questions . . . ." (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 [2005].)

Parties and lower courts can live with an *ad hoc* standard as long as there are *some* reliable guidelines for its application. This case shows the need for something more than the current *laissez faire ad hoc*ery. It was not subject to dispute that the regulations applied by Respondent California Coastal Commission would allow *no more than* 20% of Petitioner Pratt Construction Co.'s 124-acre property to be put to productive private use. Beyond that,

Pratt's appraiser opined that the regulations could actually limit use of the subject 124-acre tract to as little as *1120 square feet*. The California courts held *as a matter of law* that this severe restriction *could not* be a taking and granted summary judgment to the Coastal Commission without trial. (App. 22, 27.)

If, as the Court seems determined, *Penn Central* is to remain the takings touchstone,[1] then a manageable *ad hoc* factual test should be enforced by the Court and applied by lower courts after trials based on contested evidence, not merely on a subjective and unsupported judicial impression of what the regulatory impact on the landowner may be without an evidentiary trial. Otherwise, the judicial system simply morphs into Joseph Story's unfair and apocryphal world where justice is measured by the length of the Chancellor's foot. (See, e.g., *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-333 [1999]; *Lochnar v. Thomas*, 517 U.S. 314, 323 [1996].)

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[1] See *Tahoe-Sierra*, 535 U.S. at 326, n. 23, referring to *Penn Central* as "our polestar" (quoting Justice O'Connor's concurring opinion in *Palazzolo*, 533 U.S. at 633); *Lingle*, 544 U.S. at 538 ("regulatory takings challenges are governed by the standards set forth in *Penn Central* . . . .").

Beyond that foundational substantive issue, this case also presents an issue resulting from the continuing confusion wrought by the ripeness rules of *Williamson County Reg. Plan. Commn. v. Hamilton Bank,* 473 U.S. 172, 186 (1985).[2] The question here is how to determine when a regulatory body has reached a "final" decision about the use that property owners will be allowed to make of their land. Here, Pratt was put through nearly a decade of administrative review, including an environmental impact analysis of ten possible uses for the property. In rejecting them all, the Coastal Commission asserted that it could not accept any of the ten alternatives and that it could not suggest any modifications because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

In contrast to the flexible, *ad hoc* approach adopted for determining whether a taking has occurred, lower courts have transmogrified the flexible, three-factor *Penn Central* analysis into rigid rules regarding the number of

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[2] Recent examples of confusion caused by a different aspect of *Williamson County* appear in Petitions for Certiorari in *Braun v. Ann Arbor Charter Township*, No. 08-250 and *Agripost, LLC v. Miami-Dade County, Florida*, No. 08-567, currently pending before the Court.

development applications that need to be made and rejected before a "final" decision can be said to have been reached, even when the administrative action makes clear after a lengthy examination of alternatives that no economically viable use would be approved. At that point, reapplications become pointless.

In this case, the "one" application involved a detailed review process that lasted the better part of a decade and included environmental analysis that examined ten different ways to use the subject property. The Coastal Commission rejected them all. In light of the reasons given for the denial, that should suffice. (Compare *Palazzolo*, 533 U.S. at 620.) But not in California.

The federal constitutional issues were raised in the complaint and in subsequent briefing in all state courts, and were expressly ruled on by the Court of Appeal. (App. 16-21)

STATEMENT OF THE CASE

The 124-acre parcel of land in this case represents the last portion of undeveloped land in a part of San Luis Obispo County, California, known as Cabrillo Estates, a residential project begun in 1963. Eighty-one acres of this parcel were designated by Pratt as Unit II of Tract 308 in 1973, and planned for 149 homes, a plan the County approved in concept.

After Unit I of Tract 308 was completed, Pratt submitted (in 1990) a proposal for this parcel. Instead of 149 homes, Pratt sought only 41. Pratt also purchased an additional 43 acres and added them to the tract. The new acreage would be left undeveloped. County processing took nearly a decade (including an Environmental Impact Report [EIR] that examined ten alternative uses for the 124 acres), and the County Board of Suprervisors approved the project in 1999.

The project left 100 of the 124 acres (i.e., 80%) undeveloped, although the County's formal plan only demanded that 60% be undeveloped.[3] Nonetheless, several parties filed administrative appeals to the Coastal Commission.[4]

After a de novo hearing, the Coastal Commission rejected Pratt's permit. In doing so, the Commission had before it all of the data examined by the County, including the EIR and

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[3] The County's plan, called a Local Coastal Program, had been approved by the Coastal Commission, as required by law. (Cal. Pub. Res. Code § 30600.5.)

[4] The Coastal Commission has appellate jurisdiction over most land use permits issued by cities and counties in California's coastal zone. (Cal. Pub. Res. Code § 30603.)

the ten alternative developments that had been considered and analyzed. In rejecting development, the Coastal Commission concluded that it could not accept any of the ten alternatives and that it could not simply suggest modifications to any of them because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.) By affidavit, Pratt's appraiser opined that the restrictions on any new proposal could limit development to as little as 1120 square feet of the 124 acres. (14 CT 3948.)

The Coastal Commission's findings made clear that no development would be permitted, even though the Commission told Pratt to go through the motions of making additional plan applications to the County. Among other things, the Commission concluded the following. *First*, the property cannot be served by bringing in water from off-site, even though the local water service provider had contracted to do so. *Second*, the Commission viewed this property as a scenic backdrop for coastal property, i.e., that it served as some sort of ecological wallpaper for others to enjoy — but only as long as it had no houses built on it. *Third*, some 80% of the property constituted Environmentally Sensitive Habitat Area (ESHA) within the meaning of the California Coastal Act. *None* of that property, plus a

buffer zone around it, can be developed for productive private use. (E.g., Cal. Pub. Res. Code § 30240; *Bolsa Chica Land Trust v. Superior Court*, 71 Cal.App.4th 493, 508, 83 Cal.Rptr. 850 [1999]; *Sierra Club v. California Coastal Commn.*, 12 Cal.App.4th 602, 615, 15 Cal.Rptr. 779 [1993].) *Fourth*, the Commission sought to "preserve" the property for species that had never been seen on it. How can a rational landowner overcome that by repeated applications?

In short, as the Coastal Commission staff report for this project candidly put it, "development" would be "habitat degradation." (19 AR 3190.) That should be "final" enough to trigger litigation.

Pratt sued to overturn the Commission's ruling or, failing that, to obtain just compensation for the taking of its property for public use. The trial court denied all relief as a matter of law through judgment on the pleadings and summary judgment. (App. B.) The Court of Appeal affirmed (App. A) and the California Supreme Court denied review, with two Justices dissenting (App. C).

REASONS FOR GRANTING THE WRIT

I.

THERE IS CONFUSION IN THE LAW AS TO THE BASIC STANDARDS TO ESTABLISH A REGULATORY TAKING. LOWER COURTS AND LITIGANTS NEED THIS COURT'S GUIDANCE.

It would be easy to cite treatises and law reviews attesting to the absence of standards in regulatory taking law and the need for guidance from the Court.

Easy, but not necessary. The Court's own opinions make the point clearly, and decisions like the one below show the need for guidance.

> "In Justice Holmes' well-known, if less than self-defining, formulation, 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'" (*Palazzolo*, 533 U.S. at 617 [quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)].)

> "The rub, of course, has been — and remains — how to discern how far is 'too far.'" (*Lingle*, 544 U.S. at 538.)

"[W]e have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries.'" (*Tahoe-Sierra*, 535 U.S. at 326 [quoting *Lucas v. South Carolina Coastal Council*, 438 U.S. 1003, 1005 [1992], which, in turn, quoted *Penn Central*, 438 U.S. at 124].)

"Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." (*Palazzolo,* 533 U.S. at 617.)

"[O]ur regulatory takings jurisprudence cannot be characterized as unified . . . ." (*Lingle*, 544 U.S. at 538.)

"Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." (*Tahoe-Sierra*, 535 U.S. at 326.)

> "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings." (*Tahoe-Sierra*, 535 U.S. at 326, n. 23 [quoting with approval from *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)].)
>
> "The temptation to adopt what amount to *per se* rules must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." (*Tahoe-Sierra*, 535 U.S. at 326, n. 23 [quoting with approval from *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)].)
>
> "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors . . . ." (*Palazzolo*, 533 U.S. at 617.)

The Court has thus created a rule that provides no road map to those who have to either live with it or apply it. Property owners thus have to litigate through the last court of

last resort that will hear them in order to learn whether they have even properly drafted a complaint alleging a 5th Amendment claim. There has been enough litigation of this sort during the last three decades for the law to have progressed beyond elementary pleading.

The result of the Court's reluctance to provide guidance has led to anarchy. A prominent text summed up this Court's regulatory taking decisions as belonging to "the gastronomic school of jurisprudence; that is, this is an area where government acts according to gut feeling in the individual case, instead of by rule of law." (1 Norman Williams, Jr. & John M. Taylor, American Land Planning Law 103 [2003 rev. ed.].)

> "In these decisions, the Court has said again and again that there is no one formula for deciding the taking issue, and thus the Court has simply decided each case 'on the merits.' Translated into plain English, this is a frank admission . . . that cases are decided with little guide to predictability for future decisions." (*Id.* at 102.)

Without a "guide to predictability for future decisions," lower courts are adrift in the proverbial rudderless boat on an uncharted sea,

and thus free to measure justice by the size of their own feet. As Professor Eagle put it, "[w]hile recourse to a totality-of-the-circumstances test permits the Court almost unlimited latitude in decision making, it gives little guidance to the federal and state courts that must apply it." (Steven J. Eagle, Tahoe Sierra *and Its Implications for Takings Law*, in Taking Sides on Takings Issues: The Impact of *Tahoe-Sierra*, ch. 1B at 22 [Thomas E. Roberts, ed. 2003].) A recent decision of the Court of Appeals for the Federal Circuit described this Court's test as a "gestalt approach" (*Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360, 1370 [Fed. Cir. 2004]) — a judicially polite way of saying there are no rules.

Commentators from both ends of the political spectrum have called for the Court to discard the *Penn Central* test.[5] Both have

[5] E.g., John D. Echeverria of Georgetown's Environmental Policy Center not only wrote an amicus brief for environmental organizations in *Tahoe-Sierra* urging the Court to overrule *Penn Central*, he published an article with a revealing title. (John D. Echeverria, *Is The* Penn Central *Three Factor Test Ready For History's Dustbin?* 52 Land Use L. & Zoning Digest 3 [2000].) Professor Richard Epstein of the University of Chicago filed an amicus brief in the same case on behalf of the Institute for Justice asking the Court to do likewise.

explained the shortcomings of the *Penn Central* mode of analysis, basing their conclusions on the three decades of experience that lower courts and litigants have had with it.

Nonetheless, the Court seems determined to maintain the *Penn Central* test as "the default rule . . . in the regulatory taking context . . . ." (*Tahoe-Sierra*, 535 U.S. at 332.) If that is to be the case, lower courts and litigants are in desperate need of guidance in how to apply it.

Here, for example, there is no dispute that existing regulations prevent the use of at least 80% of the property (and probably substantially more — something that, if permitted, a trial would have revealed). The Coastal Commission found that 80% of the property was undevelopable ESHA. Both the Coastal Act and cases decided under it preclude private use of that property plus a protective buffer around it. (Cal. Pub. Res. Code § 30240; *Bolsa Chica Land Trust v. Superior Court*, 71 Cal.App.4th 493, 508, 83 Cal.Rptr. 850 [1999]; *Sierra Club v. California Coastal Commn.*, 12 Cal.App.4th 602, 615, 15 Cal.Rptr. 779 [1993].) Perversely, the court below felt free to invert that statistic and to proclaim as a matter of law that no taking could have occurred because "[a]ssuming Pratt's claim is true, that leaves 20 percent of

the 121-acre tract, over 24 acres, available for development." (App. 17.)[6]

The anarchy is demonstrated by the conflict of the conclusion below with the long-running Florida Rock litigation in the Court of Federal Claims and the Federal Circuit Court of Appeals.[7] In the final chapter of that litigation, the court concluded that Corps of Engineers regulations that reduced the value of the property by 73.1% — a similar, but lesser, restriction than the 80+% here — established a taking that required compensation. (*Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 36 [1999].)

The lower courts, and the government agencies and property owners served by them, need guidance. It should be apparent that the

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[6] This was a pure assumption made without evidence, based on a supposition that if 80% of the property was undevelopable ESHA, the remainder must be available for development. Evidence (including the proferred affidavit of an appraiser showing that current regulations could restrict development to a scant 1120 square feet of this 124-acre tract) would have shown otherwise.

[7] See, e.g., (all cases bearing the name *Florida Rock Indus., Inc. v. United States*), 18 F.3d 1560 (Fed. Cir. 1994); 21 Cl. Ct. 161 (1990); 791 F.2d 893 (Fed. Cir. 1986); 8 Cl. Ct. 160 (1985).

Court's desire to refrain from establishing firm rules has not served well. It allows so much flexibility to lower courts that this constitutional field is left with no real standards at all. The result is a continuous roiling of the litigation waters below, with a steady stream of academic criticism and certiorari petitions to this Court.

If *Penn Central* is to remain the "polestar," as the Court seems intent on maintaining it, then the *ad hoc* factual examination required by it needs to be enforced. Courts like the one below cannot be allowed to pronounce *ex cathedra* that the severe land use regulation before them is not severe enough to warrant constitutional condemnation — or even a trial to determine the actual impact.

In *Tahoe-Sierra*, the Court concluded that *Penn Central*'s *ad hoc* rule is the "default" rule for regulatory takings. (535 U.S. at 332.) Just so. But if "*ad hoc*" is to be the rule, then it must require trial as part of "the default rule" to determine the factual impact of the regulation in question. Otherwise, it isn't *ad hoc* and it isn't a rule — it is more in the nature of judicial whim on the part of lower court judges.

Since the Court re-entered the regulatory takings realm in 1978 with *Penn Central*,[8] it has shied away from providing clear rules defining regulatory takings. Instead, as quoted above, the Court has provided the lower courts, the bar, and the citizenry with a series of generalities that provide no guidance. It is time for a change. If there are to be no black letter rules, then there needs to be a clear requirement that evidence of the *ad hoc* situation be provided to, and passed on by, a trier of fact. There is no way to make rational *ad hoc* decisions than to root them in facts.

II.

THE CALIFORNIA COURTS' ANALYSIS CONFLICTS WITH THIS COURT'S SETTLED REGULATORY TAKING DECISIONS. IF THE UNDERLYING PRECEPTS ARE TO BE CHANGED, THAT CHANGE MUST COME HERE, NOT FROM AN INTERMEDIATE STATE COURT.

The California Court of Appeal justified the Coastal Commission's regulatory action by asserting there was a valid basis for it: "it is the lack of water, not a regulation, that causes the harm." (App. 19.) That is foundationally

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[8] The Court had absented itself after deciding *Pennsylvania Coal Co. v. Mahon* in 1922.

wrong because the protection afforded the rights of property owners by the 5th Amendment cannot be undone by focusing on the good intentions of the regulator.

Valid regulations, enacted for benign, or even beneficent, purposes require compensation if their impact on private property violates the 5th Amendment. (*First English*, 482 U.S. at 315 [5th Amendment designed "to secure compensation in the event of *otherwise proper interference* . . ."] [emphasis added]; *McDougal v. County of Imperial*, 942 F.2d 668, 676 [9th Cir. 1991] [rejecting notion that "any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required."].)

Indeed, the California rationale would eliminate constitutional liability for all regulations — overturning, in the process, each of this Court's decisions to the contrary. It could, for example be said that it is the presence of endangered species, not a regulation protecting them, that causes harm to private property. Yet such regulations result in liability. (*City of Monterey*, 526 U.S. 687.) Or it could be said that it is the need for coastal access, not a regulation demanding it, that causes harm to private property. Yet access regulations can still cause a taking. (*Nollan*,

483 U.S. 825.) Or it could be said that it is the danger to coastal resources, not regulations protecting them, that causes harm to private property. Yet those regulations, too, can cause a taking. (*Lucas*, 505 U.S. 1003.)

In short, to prevail in a regulatory taking case, the Coastal Commission needs to do more than simply assert (as it did below) that its actions are consistent with the general public interest as expressed in the Coastal Act:

> "We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim . . . . As we have said, a 'State, by *ipse dixit*, may not transform private property into public property without compensation . . . .' [Citation.]" (*Lucas*, 505 U.S. at 1031.)

In regulatory taking cases, it is the *impact* of the regulations that is at the heart of the *ad hoc* analysis, not the worthiness of the justification. Good intentions do not trump the constitution. (*First English*, 482 U.S. at 315.) Impermissible government action is *ultra vires*

and void. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [wartime seizure of steel mills voided].) That is why it is the regulation, not the rationalization, that is of controlling importance. (E.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 [1982]; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 [1979] [government regulations pursuing commendable goals were nonetheless takings].)

The ease with which the California courts used their belief in the rectitude of the regulatory purpose to prevent a trial on the impact of the regulation on the property owner demonstrates strongly the need for this Court's intervention. Belief in the righteous basis for regulatory action cannot eliminate the rights of the regulated — at least their right to present evidence of the impact of the regulation. Not if *Penn Central* is to retain any meaning at all.

III.

ENOUGH IS ENOUGH. HOW MUCH PROCESS MUST A PROPERTY OWNER SUFFER BEFORE AN AGENCY'S POSITION IS DEEMED "FINAL" ENOUGH FOR JUDICIAL REVIEW ON THE MERITS?

Due process can be denied by too much as well as not enough process — indeed, it can drown any semblance of due process of law. Years ago, Fred Bosselman, dean of the national land use bar, queried whether "our system of land use and environmental regulation [can] become so Byzantine as to deny due process of law to the participants through the sheer complexity of the system." (Quoted in Donald Hagman & Dean Misczynski, Windfalls for Wipeouts 12 [1978].)

This case shows how Bosselman's fears have materialized. This Court had a valid goal when it sought to restrict review of local government decisions to those in which the agency had reached a "final" determination of how a property owner would be allowed to make use of land. Premature adjudication serves no one. (See *Williamson*, 473 U.S. at 186; *Palazzolo*, 533 U.S. at 618.) However, some lower courts have used the Court's pragmatic desire for "finality" to launch a quest for some sort of holy

grail, thus putting off finality indefinitely, rather than viewing the facts — *ad hoc* — to determine whether enough process had been had. Just as the Court disagreed with contrary conclusions by the Rhode Island courts in *Palazzolo*, 533 U.S. at 619, the decision below cannot stand.

This case is a paradigm for two reasons.

First, during the administrative process leading up to the Coastal Commission's ruling, Pratt had spent the better part of a decade intensively working with County officials to process a development plan. As part of that process, an EIR was prepared by the County (and subjected to full probing at public hearings) that analyzed ten different alternatives for using this property. The project that is the subject of this litigation was the preferred choice by both the County Board of Supervisors and Pratt.

When the County's permit issuance was appealed to the Coastal Commission, the Commission had before it the entire record of County proceedings, including the EIR. The Commission not only rejected the permit the County had approved, it rejected the other alternatives as well. It did this by concluding that there was no way it could suggest to modify the project (e.g., by using or slightly

altering one of the alternatives) because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

Notwithstanding the Coastal Commission's suggestion that some alternative must be available that could be approved (see App. 18), the facts belie that suggestion. The reasons given by the Commission for denial will not change. The water available on site will not increase.[9] The extent of the ESHA will not decrease. The utility of the property as a scenic background for the already-developed part of the community will not change. As the Court held in *Palazzolo*, once it is clear that the reasons for denial will not change, there is no need to waste time making additional applications merely for the sake of making applications:

> "Ripeness doctrine does not require a landowner to submit applications

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[9] Please recall that the water service company for San Luis Obispo County had assured Pratt and the County that it could provide adequate water for the project. The Coastal Commission simply did not like the idea of bringing water from off-site (although the County had approved) and the courts gave short shrift to the water company's promise. (App. 19.)

for their own sake." (533 U.S. at 622.)[10]

In this context, rigid application of a multiple application rule makes no more sense than it did in *Palazzolo*. The Coastal Commission's views on private development of this property are clear. The rejection of all ten alternatives analyzed in the EIR removes any doubt. In the ripeness framework of *Williamson County*, where the idea is to allow sufficient consideration of alternatives to be able to conclude that sufficient finality has been reached to allow a court to conduct a 5th Amendment analysis, it should make no difference whether the various alternatives were considered seriatim, as part of technically separate permit applications, or as part of one comprehensive analysis of the property, as here. The point is to find the answer, not to engage in process for its own sake.

Second, the Coastal Commission has only administrative appellate jurisdiction over this

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[10] The Court of Federal Claims has applied this rule for years against the federal government. (E.g., *Formanek v. United States*, 18 Cl. Ct. 785, 792 [1989]; *Beure-Co. v. United States*, 16 Cl. Ct. 42, 49 [1988]; *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 386 [1988].)

property, not plenary land use control. The latter is held by San Luis Obispo County. The only time the Coastal Commission has even the potential of reviewing the use of this property is if the County grants a development permit and some project opponent appeals, as happened here. (Cal. Pub. Res. Code § 30603[a].) In no event does Pratt have the ability to present an application directly to the Coastal Commission. (Cal. Pub. Res. Code§ 30603.)

Thus, unlike *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), it is virtually impossible for Pratt to receive repeated plan rejections from the Coastal Commission. As noted above, however, the scrutiny given by the Commission in this one intense experience was the equivalent of multiple plan applications and rejections. If the Commission cannot be called to account in this situation, then the Court may as well issue it a certificate of 5th Amendment immunity, because it is unlikely that any compensation case will ever ripen against it. [11]

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[11] The Commission's most famous case, of course was *Nollan*, 483 U.S. 825, which it lost on 5th Amendment grounds, but no compensation was sought there.

"Ripeness" should not be a game. To Pratt and other land developers, it feels as though that is what it has become for regulators.[12] After three decades of planning efforts, on projects that reduced the proposed density of the project from 149 homes to 41 homes and from a design that virtually covered the property with houses to one that leaves 80% of it undeveloped, the courts below held that this case was still not ripe. On the contrary, litigation may be the only thing it *is* ripe for.

As *Palazzolo* put it, the point of a ripeness investigation is to make sure that the regulator's intentions with regard to the property are known with a "reasonable degree of certainty . . . ." (533 U.S. at 620.) Not "complete" certainty; a "reasonable degree" thereof. The law cannot demand more. It is not, after all, science. Pragmatic evaluation must be the hallmark. The facts here show

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[12] Justice Brennan described a famous incident in which a prominent government lawyer waxed exuberant over the gaming aspects of the system and the ability to keep property owners running like hamsters on a wheel. (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, n. 22 [1981] [dissenting opinion].) Since Justice Brennan brought the games to light, public acknowledgement has gone to ground. But the games remain afoot.

that rigid enforcement of a "more than one" application rule will neither answer the ripeness question nor achieve a just result.

The Coastal Commission's hostility to development of this parcel is clear in the staff report which, among other things, equates "development" with "habitat degradation" (19 AR 3190) and views the Pratt property as some variety of ecological wallpaper for others to enjoy as "an open space backdrop" (19 AR 3202) for their own homes. It also sought to "preserve" habitat for species never seen on the property. (Compare *City of Monterey*, 526 U.S. at 695 [city sought to create habitat for butterfly not found on the property].)

If the concept of ripeness in regulatory taking cases is to have any meaning, it must be grounded in pragmatism and freed of rigidity. As this case shows, the record of a single permit consideration can be sufficient to prove a "final" determination of what use will be allowed on the property.

CONCLUSION

It has been three decades since the Court created the *Penn Central* mode of *ad hoc* factual examination of each regulatory taking case. The Court has steadfastly refused to

provide more specific guidance on how to conduct such an *ad hoc* review. As a result, lower courts have taken advantage of the vacuum and adopted what some informed observers have called a "gastronomic" process and others a "gestalt" process. Whatever called, the process leaves litigants adrift, with no clue how cases will come out. More to the point, it leaves lower courts with the ability to revert to the Chancellor's foot standard of justice.

If the Court's *ad hoc* approach is to have any meaning, then there is no room for decisions like the one below that, without a trial, decided as a matter of law that regulatory action stripping a property owner of *at least* 80% of the use of valuable land — and probably far more, as a trial would have shown — cannot be a taking.

That cannot make sense under an *ad hoc* rule. Certiorari is needed in order to make as much sense as possible out of the *Penn Central* factors.

Certiorari is also needed to restore flexibility to ripeness determinations. Whereas the Court has insisted on *ad hoc* evaluation of whether a taking has occurred, the lower courts have read the Court's ripeness decisions as providing a hard, *per se* line in the sand: to achieve

ripeness, the property owner must make more than one development application. Rigidity is no more help on this issue than under the *Penn Central* analysis. This case shows the need for flexibility and provides a prime opportunity for the Court to provide it.

Respectfully submitted,

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APPENDIX "A"

Filed 5/8/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

CHARLES A. PRATT CONSTRUCTION CO., INC., Plaintiff and Appellant, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	2d Civil No. B190122 (Super. Ct. No. CV 000697) (San Luis Obispo County)

If "it's a long, long time from May to December,"[1] it's an eternity from 1973 to 2008. But time, as Einstein taught us, is relative.

From a developer's perspective, time stops when rights vest. Government Code section 66498.1 confers a vested right to proceed with a development that complies with local ordinances in effect when a local agency approves a vesting tentative map. But if a development does not comply with state and federal

[1] See and listen to "September Song" – music by Kurt Weill; lyrics by Maxwell Anderson.

laws, the march of time is inexorable notwithstanding section 66498.1. This illustrates yet another perspective about time: "Nothing endures but change." (Heraclitus, a Greek philosopher, 540-475 B.C.)

Charles A. Pratt Construction Co., Inc. ("Pratt") filed this petition for a writ of administrative mandate, ordinary mandate and for damages against the California Coastal Commission ("Commission"). Pratt sought an order requiring the Commission to set aside its decision denying it a coastal development permit under the California Coastal Act (Pub. Resources Code, § 30000 et seq. ("Coastal Act")),[2] and for damages arising from a regulatory taking of its property. The trial court denied Pratt's petition for writ of administrative or ordinary mandate, and dismissed its taking claim as not ripe. We affirm.

FACTS

The History

The issues in this appeal involve a vesting tentative subdivision map in 1990. Earlier events set the issues in context.

In May of 1973, the San Luis Obispo County ("County") approved Pratt's tentative subdivision map designated as Tract 308, Units I and II. Unit I was a 25-acre parcel which could be divided into 86

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[2] All statutory references are to the Public Resources Code unless otherwise stated.

residential lots. Unit II was an 81-acre parcel which could be divided into 149 residential lots.

The County's approval was in concept only. It was subject to a number of conditions, such as approval of a grading plan and erosion control plan. Over the course of five years, the County gave Pratt extensions of time to meet the conditions.

Eventually, Pratt filed a claim with the South Central Coast Regional Commission ("Regional Commission")[3] seeking a determination that it had a vested right to subdivide Unit I into 86 lots and to complete offsite improvements. Pratt did not make a claim of a vested right for Unit II. The Regional Commission denied Pratt's claim to a vested right for a final map for Unit I. But the Regional Commission found Pratt did have a vested right to complete offsite improvements because of the substantial investment Pratt had made for those improvements.

Pratt petitioned the superior court for a writ of mandate to vacate the Regional Commission's denial of the final map for Unit I. The superior court granted Pratt relief, and the Regional Commission appealed. The Court of Appeal held that approval of the tentative map did not give Pratt a vested right because Pratt had not satisfied the conditions necessary to fulfill the requirements of the map. (*South Central*

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[3] The Commission has succeeded to the powers of the Regional Commission. (§ 30305.)

Coast Regional Com. v. Charles A. Pratt Construction Co. (1982) 128 Cal.App.3d 830, 846.) Nevertheless, the court held that because Pratt was allowed to complete the offsite improvements, the Commission must grant a permit to complete the subdivision so long as the subdivision comports with the land density requirements of the Coastal Act. (*Id.* at p. 848.) Again, the court considered only the 25 acres of Unit I. (*Id.* at p. 835.)

In 1985, Pratt submitted a new vesting tentative map to the County as Tract 1342. The new map contemplated subdivision of the 25 acres of Unit I into 40 lots with a remainder parcel of 81 acres, Unit II. A remainder parcel is one that is not proposed for development and is not counted as part of the subdivision. (Gov. Code, § 66424.6.) The County and the Commission approved the application. A final map was recorded in 1989.

The Project

In February of 1990, for the first time, Pratt applied for a new vesting tentative map, Tract 1873, that encompassed the 81 acres of Unit II, plus an additional 40 acres for open space. The new map proposed 41 residential lots. The County approved Tract 1873 on September 1, 1999.

A number of parties, including governmental agencies, appealed the County's approval to the Commission. The Commission found the appeal

presented substantial issues and set the matter for a de novo hearing. (§ 30625, subd. (b).)

At the hearing, Pratt claimed that Unit II was exempt from the Coastal Act. Pratt's claim of exemption was based on the theory that he had a vested right to complete the project or at least a vested right to complete the offsite improvements. In June of 2000, the Commission rejected Pratt's vested rights claim, and denied his application for a coastal development permit.

Pratt filed the instant action for mandamus to require the Commission to vacate its decision denying the development permit and for damages. Pratt alleged, among other matters, that the 1990 vesting tentative map vested his rights subject only to laws and policies in existence at the time, and that the Commission's decision was based on post-vesting policies. Pratt also alleged that the Commission has taken his property without compensation in that it deprived him of substantially all economically viable use of his property, has defeated his reasonable investment-backed expectations, and has unreasonably delayed his right to make beneficial use of his property.

The trial court denied Pratt's petition for writ of mandate because it found Pratt had no vested rights and that the Commission's decision denying the development permit is based on substantial evidence. The trial court granted judgment on the pleadings on

Pratt's taking causes of action on the ground that the actions are not ripe for adjudication.

DISCUSSION

I

Pratt contends the Commission lacked jurisdiction to consider the appeal.

Pratt points out that the Commission's appellate jurisdiction is limited to determining whether the permit issued by the County is consistent with the Local Coastal Plan ("LCP") and whether the permit violates coastal access policies. (§ 30603, subd. (b).) Here, because no issues were raised concerning coastal access, jurisdiction is limited to determining whether the County's permit is consistent with the LCP.

Pratt argues that his filing of the vesting tentative map in 1990 gave him the right to develop his property subject only to laws and policies existing at the time. Pratt claims, and the Commission does not dispute, that the Commission's denial of his coastal development permit is based on policies enacted after he filed his vesting tentative map.

Pratt's vested rights argument relies on Government Code section 66498.1, subdivision (b). Subdivision (b) provides in part: "When a local agency approves or conditionally approves a vesting tentative map, that approval shall confer a vested right to proceed with development in substantial compliance

with the ordinances, policies, and standards described in Section 66474.2." Subject to exceptions not relevant here, Government Code section 66474.2, subdivision (a) requires a local agency to apply only those ordinances, policies and standards in effect on the date the local agency has determined the tentative map application is complete.

The flaw in Pratt's argument is Government Code section 66498.6, subdivision (b). That subdivision provides: "The rights conferred by this chapter shall relate only to the imposition by local agencies of conditions or requirements created and imposed by local ordinances. Nothing in this chapter removes, diminishes, or affects the obligation of any subdivider to comply with the conditions and requirements of any state or federal laws, regulations, or policies and does not grant local agencies the option to disregard any state or federal laws, regulations, or policies."

In an attempt to avoid Government Code section 66498.6, Pratt claims that once the LCP is certified by the Commission, it becomes a matter of local law. Thus, Pratt argues, the vesting provisions of Government Code section 66498.1, subdivision (b) apply.

Under the Coastal Act's legislative scheme, however, the LCP and the development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy. The Commission's primary responsibility is the implementation of the Coastal Act. It is designated the state coastal zone planning and management

agency for any and all purposes. (§ 30330.) Local government prepares the LCP. (§ 30500, subd. (a).) But the LCP must be submitted for the Commission's approval. (§ 30512, subd. (a).) The Commission may certify the LCP only if it meets the requirements of and is in conformity with the policies of the Coastal Act. (§ 30512, subd. (c).) Zoning and other actions to implement the LCP must also be submitted to the Commission for approval. (§ 30513.) Once the Commission certifies the LCP and all implementing actions become effective, the Commission's authority over coastal development permits is "delegated to the local government. . . ." (§ 30519, subd. (a)) Finally, the Commission has appellate jurisdiction to determine whether the development permit issued by the local government is consistent with the LCP and coastal access policies. (§ 30603, subd. (b).)

Although local governments have the authority to issue coastal development permits, that authority is delegated by the Commission. The Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act. In fact, a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government. (See *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 489 [Commission exercises independent judgment in approving LCP because it is assumed statewide interests are not always well represented at the local level].) The Commission applies state law and policies to determine whether the development

permit complies with the LCP. Under Government Code section 66498.6, subdivision (b), such state laws and policies are not subject to the vesting provisions of Government Code section 66498.1, subdivision (b). The filing of Pratt's vesting tentative map did not deprive the Commission of jurisdiction.

Pratt's reliance on *Yost v. Thomas* (1984) 36 Cal.3d 561, is misplaced. There, after the Commission certified the LCP, the city approved a general plan amendment, a specific plan and rezoning affecting property in the coastal zone. Opponents of the city's acts sought to rescind them by referendum. The property owner claimed the city's acts were not subject to referendum because they were administrative, and only legislative acts are subject to referendum. Although the acts are ordinarily legislative, the owner argued that the requirement that the city comply with the LCP makes the city an agent of the state in enacting land use policies in the coastal zone. (*Id.* at p. 571.) Our Supreme Court rejected the argument, stating: "[The Coastal Act] leaves wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement those plans. Under such circumstances a city is acting legislatively and its actions are subject to the normal referendum procedure." (*Id.* at p. 573.)

Yost stands for nothing more than that a city's actions in implementing the LCP retain their legislative nature for the purposes of referendum. That does not mean that once the LCP is certified, it becomes a matter of local law. The city's actions in implementing

the LCP, as well as any coastal development permit issued by the city, are still subject to Commission review. (§§ 30513, 30603.) *Yost* did not involve the question at issue here. A case is not authority for issues it does not consider. (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660.)

II

Pratt contends the Commission's actions were arbitrary and capricious. We must uphold the Commission's findings of fact if they are supported by substantial evidence. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1282, 1288-1289.) We reverse if no reasonable person would have reached the same conclusion. (*Id.* at p. 1289.)

(a)

Pratt argues the Commission erred in treating the vast bulk of his property as an Environmentally Sensitive Habitat Area (ESHA). It claims the LCP designates that portion of its property as a Sensitive Resource Area (SRA). Pratt claims that an ESHA is only one type of SRA. It points out that there are other types of SRA's, but the ESHA is the most extreme in its impact on development.

The map on which Pratt relies shows a large portion of its land designated as an SRA. But the map also shows the area designated as a "terrestrial habitat." A legend on the map lists "terrestrial

habitats" as among "sensitive resource areas that are also environmentally sensitive habitats." Thus substantial evidence supports the Commission's treatment of a large portion of Pratt's parcel as an ESHA.

Pratt's reliance on *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, is misplaced. There the court determined that the Commission has no jurisdiction on an appeal of a coastal development permit to designate a new ESHA that contradicted the terms of a certified LCP. Here the Commission did not seek to create a new ESHA designation on Pratt's land. It simply determined correctly that the LCP had designated much of Pratt's land to be an ESHA.

(b)

Pratt argues the Commission used the County's generic provision for view protection rather than the LCP. Pratt does not specify in what way the Commission relied on the County's generic rules instead of the LCP in assessing visual impacts. Instead, Pratt cites a number of ways in which it believes it has complied with the LCP.

Pratt points out that the LCP requires clustering of homes in a way that leaves 80 percent of the property undeveloped. But that does not mean that the proposed development on the remaining 20 percent complies with all other policies of the LCP.

Pratt points out that the LCP encourages placing development in "slope created 'pockets'" to minimize visual impacts. Pratt argues the County found its project satisfies that standard. But if the Commission were bound by the County's finding that the project complies with the LCP, there would be no reason to allow an appeal to the Commission. It is simply no argument to say that the County found the project meets the LCP's view preservation requirements. The Commission recommended that development be limited to below the 600-foot contour, as in an alternative project approved by the County's planning commission. That would be the same elevation as homes in an existing adjacent site.

Pratt claims its project will satisfy the requirement that building materials use native materials and textures. Assuming that is true, it does not mean other visual impacts meet the requirements of the LCP.

(c)

Pratt challenges the Commission's findings on the availability of water. Pratt points out that it obtained a "can and will serve" letter from the Southern California Water Company. Pratt claims the Commission simply ignored the letter.

But it is undisputed that Pratt's project lies outside the Urban Services Line ("USL"). The LCP allows development outside the USL only "if it can be serviced by adequate private on-site water and waste

disposal systems." Thus a commitment by a community offsite water company, such as Southern California Water Company, is insufficient.

Pratt points out that Southern California Water Company plans to supply a private onsite man-made reservoir. The County found this sufficient to satisfy the LCP's "private on-site water" requirement. But the Legislature made the Commission, not the County, the final word on the interpretation of the LCP. (See, § 30603, subd. (b).) Indeed, under the County's interpretation of the LCP, community offsite water service becomes private onsite water service simply because the water is temporarily stored in a man-made reservoir. Under the County's interpretation, the LCP's intent to give priority for community-based services to land within the USL is easily defeated. The most reasonable interpretation of the LCP's "private on-site water" requirement is that it is limited to water developed from naturally occurring sources on the project site. Pratt's project does not meet that requirement.

(d)

Pratt argues that the Commission suffers from "legal myopia" in its determination that no development can occur on the Pratt property until after all the "infill" lots within the USL have been "built out."

The Commission concluded: "The project is inconsistent with LCP provisions that prohibit subdivisions unless there are adequate public services to

accommodate the new lots, after priority uses such as agriculture and infill of existing lots within the urban area have been accommodated. Because there are significant unresolved issues with respect to the availability of such services, particularly water and sewage treatment, the project can not [sic] be found to be consistent with these LCP requirements and therefore must be denied."

Pratt does not dispute the Commission's conclusion that the LCP mandates infill lots within the USL have priority on public services. Instead, Pratt asserts, without citation to the record, that the infill lots are under an indefinite, if not permanent, moratorium imposed by the Regional Water Quality Control Board. Assuming the infill lots are under a moratorium, Pratt cites no authority that the moratorium frees the Commission from enforcing the policy contained in the LCP giving priority to the infill lots.

(e)

Pratt argues there is no basis for the Commission's combined water and sewer objections. Pratt points out that the Environmental Impact Report (EIR) for the project concludes that the water usage and replenishment for the project are essentially in balance.

The final EIR for the project states that the groundwater basin on which the project would rely is in overdraft. The final EIR also states, however, that unlike most projects, Pratt's project would actually

increase recharge of the groundwater basin. The EIR quotes a comment from the County's engineering department after its review of the draft EIR: "'In the worst-case scenario, the project would increase the overdraft by 2.5%; in the best case, the project would reduce the overdraft by less than 1%. . . .'"

In rejecting the EIR's conclusion, the Commission stated: "Based on the assumed increase in recharge that would result from the project, and the expectation that this recharge will exceed the consumptive water use of the project, the EIR concludes that the project will result in a net increase of available water resources, and no significant impacts to water resources will occur. [Fn. omitted.] [¶] The Commission can not [sic] agree with this assumption, based upon the highly speculative nature of the amount of recharge being assumed by the EIR. It appears scientifically unfounded that the proposed development, which will cover open space areas comprised of sandy soils and drought tolerant vegetation with impervious surfaces, will increase the amount of groundwater recharge that is currently occurring on the site. Appendix C of the Final EIR does not provide the data necessary to support this questionable assumption."

Pratt cites no authority that the Commission is bound by the findings in the draft EIR. Here the Commission simply rejected a conclusion that seems at best highly suspect. In any event, even if the project balanced water usage and replenishment, that

would not affect the LCP's policy giving priority to other uses.

Each of the Commission's reasons for denying the permit is supported by the record. Any one of them is sufficient to sustain the denial.

III

Pratt contends that if the Commission's interpretations of the LCP are correct, there is no economically productive use that can be made of its property. Pratt concludes its taking claim is ripe for adjudication.

The Fifth Amendment to the United States Constitution prohibits a taking of property for public use without just compensation. The Supreme Court has articulated two circumstances that constitute a categorical taking: where the regulation allows a permanent physical invasion of the property or where the regulation deprives the owner of all economically viable use. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.)

In *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 (*Penn Central*), the Supreme Court discussed non-categorical takings. The court observed, "[T]he 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . .'" (*Id.* at p. 123, quoting *Armstrong v.*

United States (1960) 364 U.S. 40, 49.) The court stated that whether a regulation becomes a taking under this standard will rest on an ad hoc factual inquiry into the particular circumstances of the case. (*Id.* at p. 124.) It is only when a regulation goes "too far" that it becomes a taking. (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.)

Here the trial court dismissed Pratt's taking claim pursuant to the Commission's motion for summary adjudication on the ground that the claim is not ripe. As the Supreme Court explained in *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618, "[A] takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" (Quoting *Williamson Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172, 186.) A final decision by the responsible state agency determines whether a regulation has deprived a landowner of all economically beneficial use of his property or results in a non-categorical taking under *Penn Central.* (*Palazzolo,* at p. 618.)

Pratt claims that 80 percent of his tract is designated ESHA and that no development is possible in an ESHA. Assuming Pratt's claim is true, that leaves 20 percent of the 121-acre tract, over 24 acres, available for development.

Moreover, the Commission noted the availability of alternative lot configurations, such as one approved

by the County's planning commission, as sensitive to both habitat and views. Pratt appealed the planning commission's approval to the County's Board of Supervisors where it was overturned. Far from showing the Commission has made a final determination as to what use, if any, will be allowed for Pratt's property, the Commission has shown its willingness to consider alternatives to Pratt's proposal.

Pratt argues the Commission decided the project cannot satisfy the water requirements for three reasons: the project has no water onsite; it is outside the USL and cannot have water brought to it; and the Commission is on record as refusing a division of one parcel into three inside the USL because there is not enough water.

The Commission stated: "As detailed above, the existing demand on water from the Los Osos Groundwater Basin appears to be exceeding the safe yield of this basin based upon the best available scientific information. Thus, there does not appear to be adequate water available to support the development of Coastal Act priority uses or existing undeveloped lots within the USL, let alone new subdivisions outside the USL. [Fn. omitted.] As a result, approval of a 41-lot subdivision outside of the USL would be clearly inconsistent with the priorities for water service established by . . . [the LCP]."

The Commission concluded only that a 41-unit subdivision would be inappropriate. It did not decide that a less intense project could not gain approval.

Moreover, Pratt cites no authority that the denial of a development permit because of insufficient water supply constitutes a taking. Nor does Pratt cite authority that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm.

That the Southern California Water Company issued a "can and will serve" letter does not change the results. Pratt cites no authority that the water company's determination is definitive. It is undisputed that there is substantial evidence from which the Commission could conclude the groundwater basin from which the water would come is in overdraft. Pratt has simply failed to demonstrate with sufficient certainty that its proposed 41-unit subdivision will have an adequate supply of water. Without such a demonstration, the extent of the development that can be allowed on its parcel cannot be determined.

Finally, it is undisputed that Pratt has no approval for a wastewater disposal plan from the Regional Water Quality Control Board. It is also undisputed that an approved plan is necessary for development. Pratt fails to explain how the extent of allowed development on his parcel can be determined without such a plan.

Pratt is not entitled to whatever project it desires. Pratt has yet to submit proposals that contemplate a reduction in the size, scope, configuration or density of the project. (See *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 329.) Pratt claims it has been trying to develop its parcel for 30 years. The claim is demonstrably untrue. This is the only opportunity the Commission has been given to review a development proposal for this parcel. What development plan, if any, the Commission will approve has yet to be determined.

This case is unlike *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687. There, after five formal decisions and 19 different site plans, a developer brought an action against the city, alleging the city would not permit development of the property under any circumstances. (*Id.* at p. 698.) Here Pratt has presented only one plan to the Commission and the Commission has made only one formal decision. That formal decision does not settle the question of what development will be allowed; nor does it indicate it would be futile for Pratt to submit other development plans.

Pratt's reliance on *Palazzolo* also is misplaced. There the court determined the developer's taking claim was ripe. The state commission's interpretation of its regulations made it clear that no development would be allowed on the wetlands portion of the developer's property. That left only a small upland portion of the parcel available for development. The state had previously accepted that the upland portion

of the parcel was suitable for only one single-family residence and had a value of $200,000. (*Palazzolo v. Rhode Island, supra,* 533 U.S. 606, 621-624.) Here, unlike *Palazzolo,* it is far from determined how much development can occur on Pratt's property.

The judgment is affirmed. Costs on appeal are awarded to respondent.

CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

E. Jeffrey Burke, Judge
Douglas G. Hilton, Judge
Superior Court County of San Luis Obispo

Manatt, Phelps & Phillips, LLP, Michael M. Berger; William S. Walter for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, John A. Saurenman, Supervising Deputy Attorney General, for Defendant and Respondent.

APPENDIX "B"

SUPERIOR COURT OF CALIFORNIA,
SAN LUIS OBISPO

COUNTY OF SAN LUIS OBISPO

CHARLES A. PRATT CONSTRUCTION CO., INC., a California Corporation Petitioner and Plaintiff, **v.** **CALIFORNIA COASTAL COMMISSION, CALIFORNIA STATE BOARD OF CONTROL, and DOES 1 through 100, inclusive,** Respondents and Defendants.	CASE NO. CV000697 ~~[PROPOSED]~~ **JUDGMENT** (Filed Feb. 9, 2006) Dept: Veterans Memorial Bldg. Judge: Honorable Douglas Hilton Trial Date: August 16, 2004 Action Filed: August 11, 2000

Petitioner and plaintiff Charles A. Pratt Construction (Pratt Construction) filed this action on August 14, 2000. The current operative petition and complaint is the Second Amended Verified Petition for Writ of Mandamus [C.C.P. § 1094.5; Pub. Res. Code § 30801]; or Alternatively, for Writ of Mandate [C.C.P. § 1085]; and Complaint for Damages (hereafter "Second Amended Petition") that states thirteen causes of action. At all proceedings in this matter. William S. Walter, Esq., appeared on behalf of petitioner and plaintiff Charles A. Pratt Construction Co.,

Inc., and Bill Lockyer. Attorney General of the State of California, appeared on behalf of respondents California Coastal Commission and California Board of Control through John A. Saurenman, Supervising Deputy Attorney General.

The court has resolved this matter as follows:

1. On August 21, 2002, the court (Honorable Jeffrey Burke presiding) heard argument on Pratt Construction's tenth, eleventh and twelfth causes of action seeking writs of mandate. On September 23, 2002, the court entered its Ruling on Petition for Writ of Mandate. Attached hereto as Exhibit A is a copy of that ruling which is incorporated by reference herein.

2. On October 22, 2003, the court (Honorable Douglas Hilton presiding) heard argument on the California Coastal Commission's motion for judgment on the pleadings regarding the first through ninth causes of action and the thirteenth cause of action. On November 24, 2003, the court entered its order granting the motion in part and denying it in part. Attached hereto as Exhibit B is a copy of that order which is incorporated by reference herein.

3. On June 30, 2004, the court (Honorable Douglas Hilton presiding) heard argument on the California Coastal Commission's motion for summary adjudication of the seventh and eighth causes of action. On August 30, 2004, the court entered its ruling granting the Commission's motion. Attached hereto as Exhibit C is a copy of that ruling which is incorporated by reference herein.

4. On August 2, 2005, the court (Honorable Douglas Hilton presiding) heard argument on Pratt Construction's Motion That Court Give Due Consideration to Setting Aside Interim Ruling on Summary Adjudication. On October 20, 2005, the court entered its order denying Pratt Construction's motion. Attached hereto as Exhibit D is a copy of that order which is incorporated by reference herein.

5. On October 25, 2005, the court (Honorable Douglas Hilton presiding) heard argument on the California Coastal Commission's motion for judgment on the pleadings regarding the first and second causes of action. On November 29, 2005, the court entered its order granting the Commission's motion without leave to amend. Attached hereto as Exhibit E is a copy of that order which is incorporated by reference herein.

Having resolved all causes of action in this matter, the court enters the following judgment:

IT IS ADJUDGED, ORDERED AND DECREED that:

1. The Second Amended Petition is denied in its entirety and judgment will entered in favor of the California Coastal Commission and against Charles A. Pratt Construction Co., Inc.;

2. Petitioner and plaintiff Charles A. Pratt Construction Co., Inc. is to take nothing by way of its Second Amended Petition;

3. Clerk of the Court shall enter this judgment denying the Second Amended Petition forthwith; and

4. Defendant and Respondent California Coastal Commission is awarded its costs in this matter in the amount of $_____.

IT IS SO ORDERED.

Date: February 9, 2006

/s/ Douglas Hilton
HONORABLE
DOUGLAS HILTON
JUDGE OF THE
SUPERIOR COURT

Approved as to form:

WILLIAM S. WALTER
A PROFESSIONAL CORPORATION

/s/ William S. Walter
WILLIAM S. WALTER

Attorney for Petitioner and Plaintiff
Charles A. Pratt Construction Co., Inc.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Charles A. Pratt Construction Co., Inc. v. California Coastal Commission**

No.: **San Luis Obispo Superior Court No. CV000697**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On January 27, 2006, I served the attached **[PROPOSED] JUDGMENT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with the **UPS Overnight courier service** addressed as follows:

William S. Walter, Esq.
679 Monterey Street
San Luis Obispo, CA 93401
Tel: (805) 541-6640

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 27, 2006, at Los Angeles, California.

Sharon Oliver	Sharon Oliver
Declarant	Signature

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

CHARLES A. PRATT CONSTRUCTION CO., INC. Plaintiff, v. CALIFORNIA COASTAL COMMISSION Defendant.	CASE NO. CV000697 RULING ON MOTION FOR SUMMARY ADJUDICATION (Filed Aug. 30, 2004)

INTRODUCTION

Petitioner Charles A. Pratt Construction Co. ("Pratt") seeks mandamus relief and monetary damages because of the denial of a coastal development permit by respondent California Coastal Commission ("Commission"). The Commission filed a motion for summary adjudication of the seventh cause of action (inverse condemnation) and eighth cause of action (just compensation under fifth amendment) of petitioner's second amended petition. The basis of the motion was that the two causes of action are not ripe for judicial review, and that there is no triable issue of material fact concerning ripeness. At the hearing on the motion on June 30, 2004, the court granted the Commission's motion for summary adjudication, and informed the parties that a written ruling would be prepared.

BACKGROUND

Pratt is attempting to develop Tract 1873 which encompasses approximately 124 acres of land near the entrance to Montana de Oro State Park in Los Osos. Pratt alleges, in it's second amended petition filed June 26, 2003, that a portion of Tract 1873 consists of an area formerly designated as Unit II of Tract 308. Unit II of Tentative Tract 308 was approved in 1973, but various delays and difficulties arose and Unit II was not developed. Pratt subsequently purchased an adjacent 40 acre parcel and submitted a request for approval of a new project that included both the Unit II property and the new 40 acre parcel. After eight years of hearings, studies and evaluations, the County of San Luis Obispo ("County") in 1998 approved development of the property by approving Vesting Tentative Tract 1873. The County's approval was appealed to the Commission which in June, 2000, denied the issuance of a coastal development permit for Tract 1873. In response, Pratt filed a petition for writ of mandamus on August 11, 2000, and ultimately a Second Amended Petition on June 26, 2003.

The Second Amended Petition asserts thirteen causes of action. On September 23, 2002, the court (Judge Burke, presiding) issued an order denying the 10th, 11th, and 12th causes of action for mandamus relief. On June 25, 2003, the court lifted a stay that had been imposed on the remainder of the claims, with the exception of allegations in the first and second causes of action that the Commission's actions

were void because its composition violated the separation of powers doctrine. A further stay was imposed on that issue because it is on review by the California Supreme Court. (*Marine Forests Society v. California Coastal Commission* (2002) 104 Cal.App.4th 1232, *petition for review granted,* April 9, 2003, no. S113466).[1]

On October 22, 2003, the court granted in part and denied in part a motion for judgment on the pleadings filed by the Commission. As a result of this ruling, the following causes of action remained at issue: The seventh cause of action alleging violation of the takings clause under the California Constitution (inverse condemnation); the eighth cause of action alleging violation of the takings clause under the U.S. Constitution (just compensation), and claims set forth in the first and second causes of action which are based on the *Marine Forests* issue. The Commission moved for summary adjudication of the seventh and eighth causes of action on the ground that there is no triable issue of fact with respect to its defense of ripeness.

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[1] The California Supreme Court had not yet rendered an opinion in the *Marine Forests* case when the Commission's present motion for summary adjudication was heard on June 30. 2004.

DISCUSSION

The Issue of Ripeness

The key issues presented in the Commission's motion for summary adjudication are: (1) whether the seventh and eighth causes of action are ripe for judicial review; and (2) whether the futility exception to the ripeness doctrine applies; that is, would it be futile for Pratt to apply for a coastal development permit for a less intense development?

The Commission presented the following facts to show it has not made a final decision on the nature and extent of development that will be allowed on the land encompassed within Tract 1873.

Commission Fact 11: Commission Fact 11 recites a Commission finding[2] that the locally approved project did not minimize habitat disruption and did not adequately minimize residual impacts. However, findings cited by the Commission also state that those deficiencies can be corrected by designing an alternative lot configuration such as the one approved by the Planning Commission. The lot configuration approved by the Planning Commission reduces lot sizes to 10,000 and 20,000 square feet, and limits development to an area below the 600 foot

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[2] The Commission's statement of fact cites the staff report which was included in the administrative record. The staff report is deemed to constitute the Commission's findings. (Cal. Code Regs. Title 14, § 13096(b).)

contour level in order to minimize adverse visual impacts.

Commission Fact 17: On February 15, 2001, the Commission denied Pratt's request for reconsideration. Commission Fact 17, citing the staff report, states that the Commission identified economically reasonable alternatives.

Commission Fact 18: Commission Fact 18 states that after the Commission's denial of the application, Pratt did not take any steps to propose a project that was responsive to the Commission's concerns.

The facts submitted by the Coastal Commission show that it has not made a final determination of the extent of development it will permit on the property; therefore, Pratt's takings claims are not ripe for review.

Pratt contends the case is ripe for review because of the similarity of his situation to that of the landowner in *Palazzolo v. Rhode Island* (2001) 533 U.S. 606. In *Palazzolo* the landowner brought an inverse condemnation action because he was denied the right to fill 18 acres of coastal wetlands within a larger parcel containing an "upland" area. The United States Supreme Court held that the landowner's claim was ripe for adjudication even though it was undisputed the upland portion of the property could be developed and had a value of $200,000. The Court held that although the landowner could not assert a

Lucas claim[3] for a total taking, he was entitled to argue in the lower court that there had been interference with his reasonable investment-backed expectations, thus entitling him to compensation under the holding of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104.

The Pratt property encompasses approximately 124 acres. Approximately 80% of the property is Environmentally Sensitive Habitat Area ("ESHA") within which little or no development is allowed. Pratt argues that although the non-ESHA portion of his property could be developed, just as the upland portion of the Palazzolo property could be developed, his claim is nevertheless ripe for adjudication under the holding of the U.S. Supreme Court in *Palazzolo.* However, in *Palazzolo* it was stipulated that the portion of the property capable of being developed was worth $200,000; consequently, it was possible to value the landowner's entire property and make a monetary calculation of the extent (if any) to which there had been interference with the owner's reasonable investment-backed expectations. In the present case the nature and extent of development that will be allowed by the Commission in the non-ESHA portion of Pratt's land is not known, and therefore the value of Pratt's property is not known. The Commission has expressly said it will consider development

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[3] A claim that all beneficial use of a property has been taken, entitling the owner to compensation under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003.

in the non-ESHA portion and has suggested guidelines for such development. Until the extent of permissible development is known, the case is not ripe for adjudication.

The issue of futility

The Final Environmental Impact Report ("FEIR") approved by the County contained a total of ten project alternatives. When the Commission denied Pratt a coastal development permit, it did not identify any of the ten alternatives in the FEIR as an acceptable alternative. The Commission took the position that it should await another application containing the details of a specific project proposal, rather than design a project for the applicant. The staff report recommending denial of Pratt's Motion for Reconsideration observed (at AR 1 1888) that: "There is no requirement in the Coastal Act that the Commission craft conditions that would make a project approvable. . . . In cases, such as this one, where the project would have to be completely redesigned, the Commission will often offer suggestions as part of the denial, but leave it to the Applicant to design a future project."

Pratt argues that continued efforts to develop the property would be futile, citing the failure of the Commission to approve any of the project alternatives contained in the FEIR, Pratt's long history of unsuccessful efforts to develop the property, and existing restrictions against development in Environmentally

Sensitive Habitat Areas which cover approximately 80% of his property. Pratt's contentions raise the questions: "when is enough, enough?" and "when do actions speak louder than words?" At some point in time the repeated denial of reasonable development proposals may become equivalent to a denial of any economic development. However, that point has not yet been reached in this case. The Commission has expressly stated it will consider additional proposals, and has outlined the basic elements of an acceptable proposal. Therefore, the court does not find that the submission of additional proposals would be futile.

Ruling

The Commission's motion for summary adjudication of the seventh and eighth causes of action is granted on the ground that the claims in those causes of action are not ripe for review as shown by the Commission's Facts 11, 17 and 18.

Dated: August 30, 2004

/s/ Douglas Hilton
DOUGLAS HILTON
Judge of the Superior Court

DECLARATION OF SERVICE BY U.P.S. OVERNIGHT

Case Name: **Charles A. Pratt Construction Co., Inc. v. California Coastal Commission**

No.: **CV000697**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On June 24, 2005, I served the attached **CALIFORNIA COASTAL COMMISSION'S SUPPLEMENTAL OPPOSITION TO MOTION TO VACATE SUMMARY ADJUDICATION RULING** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, with United Parcel Service Overnight Delivery at Los Angeles, California, addressed as follows:

William S. Walter
679 Monterey Street
San Luis Obispo, CA 93401
Telephone: 805.541.6601
Facsimile: 805.541.6640

I declare under penalty of perjury under the laws of the State of California the foregoing is true and

correct and that this declaration was executed on June 24, 2005, at Los Angeles, California.

Sharon Oliver	Sharon Oliver
Declarant	Signature

APPENDIX "C"

Court of Appeal, Second Appellate District,
Div. 6 – No. B190122
S164446

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Aug. 20, 2008)

CHARLES A. PRATT CONSTRUCTION CO., INC.,
Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent.

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

Kennard and Baxter, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

APPENDIX "D"

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION SIX

CHARLES A. PRATT CONSTRUCTION CO., INC., Plaintiff and Appellant, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	2d Civil No. B190122 (Super. Ct. No. CV 000697) (San Luis Obispo County) ORDER MODIFYINNG [sic] OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on May 8, 2008, be modified as follows:

1. On page 10, in the last line, the word "draft" is deleted so the sentence reads: "Pratt cites no authority that the Commission is bound by the findings in the EIR."

2. On page 14, the following two paragraphs are added before the last paragraph, which begins "The judgment is affirmed":

> Pratt complains in its petition for rehearing that we ignored its motions for reconsideration and a new trial. The motions

sought to show that actions taken by the County after the trial court's ripeness ruling preclude development on all but 1,120 square feet of Pratt's parcel. The trial court denied the motions.

We do not consider the motions for the purpose of this appeal because: Pratt raised no points on appeal challenging the trial court's denial of the motions; the material contained in the motions was not before the Commission at the time of its decision; and whatever actions the County may have taken subsequent to the Commission's decision are not relevant to Pratt's action against the Commission. The County is not a party to this action.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

APPENDIX "E"

California Public Resources Code

Section 30240 Environmentally sensitive habitat areas; adjacent developments

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Section 30600.5 Delegation of authority for issuance of coastal development permits to local governments; exceptions; application, review and appeal procedures; minimum standards; adoption of ordinance

(a) Prior to the certification of a local coastal program and notwithstanding the provisions of subdivision (a) of Section *30519,* after the effective date of this section, the authority for issuance of coastal development permits provided for in Chapter 7 (commencing with Section *30600*) shall be delegated to local governments pursuant to the provisions of this section.

(b) Except for any development specified in subdivision (b) of Section *30519* and Section *30601* or with respect to any development proposed by any state agency, the authority for issuance of coastal development permits provided for in Chapter 7 (commencing with Section *30600*) shall be delegated to the respective local governments within 120 days after (1) the effective date of certification of a land use plan pursuant to Chapter 6 (commencing with Section *30500*) or (2) the effective date of this section, whichever occurs last. This delegation shall only apply with respect to those areas governed by the certified land use plan or a certified portion thereof, applicable to an identifiable geographic area.

(c) Notwithstanding any other provision of this division, after delegation of authority to issue coastal development permits pursuant to subdivision (b), a coastal development permit shall be issued by the respective local government or the commission on appeal, if that local government or the commission on appeal finds that the proposed development is in conformity with the certified land use plan.

(d) Any action taken by a local government on a coastal development permit application pursuant to the provisions of this section may be appealed to the commission pursuant to Section *30602*. The commission shall hear an appeal brought pursuant to the provisions of this section, unless it determines that the local government action taken raises no substantial issue as to conformity with the certified land use plan. For purposes of this subdivision, failure by any

local government to act within any time limit specified in this division shall constitute an "action taken."

(e) The commission shall, following a public hearing and within 90 days after the effective date of this section, adopt minimum standards for public notice, hearing, and appeal procedures to govern local government review of coastal development permit applications pursuant to this section. The standards shall, as nearly as practical, follow the standards required for local agencies after certification of local coastal programs for appealable developments and shall ensure that the notice and hearing required for the coastal development permit can be provided at the same time as the notice and hearing requirements for other local land use decisions which may be necessary for the project requiring the permit. Within 60 days prior to assumption of authority for issuance of coastal development permits pursuant to this section, the local government shall provide drafts of all procedures for issuance of coastal development permits to the executive director of the commission. Delegation of the authority to issue coastal development permits pursuant to subdivision (b) shall not occur until the local government has provided copies of all the adopted procedures for the issuance of coastal development permits to the executive director of the commission. Any amendments to the procedures shall also be furnished to the executive director for his information.

(f) Prior to the delegation of authority to issue coastal development permits as provided in subdivision (b), a local government, after appropriate notice and hearing, shall adopt an ordinance prescribing the procedures to be used in issuing such coastal development permits. Each such ordinance shall incorporate at least the minimum standards for public notice, hearings, and appeals established by the commission pursuant to subdivision (e). In addition, each such ordinance shall contain provisions which prohibit the issuance of a coastal development permit for any development which may conflict with the ordinances which are being prepared to implement the certified land use plan.

(g) In order to expedite certification of complete local coastal programs and the transfer of coastal development controls to local government, the commission shall, on request from a local government, prepare the ordinances necessary for the local government to implement the coastal permit responsibilities of this division.

(h) The time limits set forth in subdivision (b) shall be extended, by right, for not more than 90 days if a local government, by resolution of its governing body, so requests.

(i) The provisions of this section and of any local ordinance enacted pursuant thereto shall have no further force or effect or application after that local government's local coastal program has been certified

and taken effect pursuant to the provisions of this division.

(j) This section shall become inoperative and shall have no force or effect on the date, if any, of a final judicial decision that its provisions are of inconsistent with the requirements of the federal coastal act.

Section 30603 Appeal of actions taken after certification of local program; types of developments; grounds; finality of actions; notification to Commission

(a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance.

(2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff.

(3) Developments approved by the local government not included within paragraph (1) or (2) that are located in a sensitive coastal resource area.

(4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map approved pursuant to Chapter 6 (commencing with Section *30500*).

(5) Any development which constitutes a major public works project or a major energy facility.

(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

(2) The grounds for an appeal of a denial of a permit pursuant to paragraph (5) of subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division.

(c) Any action described in subdivision (a) shall become final at the close of business on the 10th working day from the date of receipt by the commission of the notice of the local government's final action, unless an appeal is submitted within that time. Regardless of whether an appeal is submitted, the local government's action shall become final if an appeal fee is imposed pursuant to subdivision (d) of

Section *30620* and is not deposited with the commission within the time prescribed.

(d) A local government taking an action on a coastal development permit shall send notification of its final action to the commission by certified mail within seven calendar days from the date of taking the action.

Supreme Court, U.S.
FILED
JAN 15 2009
OFFICE OF THE CLERK

No. 08-668

In The Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division 6

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the petitioner have a ripe takings claim under the Fifth Amendment of the United States Constitution:

- When the petitioner has applied only once for a project on the property;
- When no land use regulatory agency has made a final determination of the permissible uses of the petitioner's property; and
- When a regulatory agency has identified an alternative development project that it potentially could approve?

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STATEMENT

1. This Court has emphasized that a landowner's takings claim is not ripe until the land-use authorities have had an opportunity to exercise their full discretion to determine the permissible uses of property. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Importantly, a takings claim is not ripe if the land-use authority has denied a substantial project but there remains some doubt whether it would accept a more modest submission or an application for a variance. *Id.* at pp. 618-621; *see MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 342, 353, fn. 9 (1986).

2. In 1973, the County of San Luis Obispo gave conceptual approval to petitioner Charles A. Pratt Construction Co., Inc.'s (Pratt) tentative subdivision map designated as Tract 308, Units I and II, in the Los Osos area on the Central California coast. Unit I contemplated subdividing 25 acres into 86 residential lots while Unit II was an 81-acre parcel that Pratt would subdivide into 149 residential lots. The County's conceptual approval was subject to a number of conditions. Thereafter, Pratt abandoned its attempt to develop Unit II. In 1989, after receiving approvals from the County and from respondent California Coastal Commission, Pratt recorded a tract map for the subdivision of Unit I into 40 residential lots. Petitioner's Appendix (App.) at pp. 2-4.

In 1990, Pratt applied for the first time to the County for a coastal development permit for Tract

1873, a proposal to subdivide 121 acres into 44 parcels. Pratt's proposal encompassed the 81 acres that had been Unit II plus an additional 40 acres that Pratt had acquired to hold as open space. In 1998, the County approved a coastal permit for Pratt, but a number of individuals and entities including the United States Fish and Wildlife Service, the California Department of Fish and Game, and the California Department of Parks and Recreation filed administrative appeals to the Coastal Commission. In 2000, the Commission denied Pratt's permit application because it was inconsistent with a number of policies of the County's certified local coastal program (LCP). App. at pp. 4-5.

Pursuant to the California Coastal Act, when the Coastal Commission reviews a permit application on appeal from a local government's action, the Commission applies the standards from the local government's LCP, which constitutes the land-use plan for that jurisdiction. Cal. Pub. Resources Code § 30603, subd. (b).

The Commission found that Pratt's project was inconsistent with many policies in the County's LCP. For example, the Commission found that a species of tree listed as threatened under the federal Endangered Species Act covered much, but not all, of Pratt's property and that the LCP mapped much, but not all, of Pratt's property as environmentally sensitive habitat. Because the LCP severely restricted development in such habitat, the Commission found that the project violated the LCP. In addition, the

Commission found that Pratt's project was not consistent with the policies of the LCP that protect visual resources. App. at pp. 10-13.

The Commission also determined that Pratt's property is located in an area where the LCP requires that water be provided from an on-site source rather than have a municipal water company provide water to the site. Pratt did not provide the Commission with any evidence of the amount of water that was available on-site. Also, the evidence before the Commission was that development in this area had resulted in an overdraft of the aquifer which provides drinking water in this region. App. at pp. 12-13, 14.

The Commission also concluded that Pratt's project did not conform to the regulations of the Central Coast Regional Water Quality Control Board (Regional Board), the agency that regulates water quality under state and federal law. Pratt proposed to use septic systems for sewage disposal. However, the Regional Board's regulations permitted the use of septic systems only on lots that were much larger that most of the lots in Pratt's proposed subdivision. Although it could have applied to the Regional Board for a permit, Pratt never did so. In its process, the Regional Board could require Pratt to reconfigure its project so that it conformed to the Regional Board's regulations for sewage disposal. That is, the Regional Board could require that Pratt increase the size of the parcels, obtain an exemption allowing the use of septic systems on smaller lots, or construct a small sewage treatment facility to serve the smaller lots.

Finally, in its review of Pratt's application, the Commission stated that the project alternative that the Planning Commission had approved, and that the County had reviewed in the environmental impact report, could potentially be approved. App. at p. 18. The Planning Commission alternative would allow Pratt a 41-lot subdivision with the lots between 10,000 and 20,000 square feet in size. This proposal clustered the development in the northwest part of the property adjacent to Pratt's previous subdivision and greatly reduced the impacts to environmentally sensitive habitat and to visual resources. However, that alternative did not address the infrastructure concerns (water supply and sewage disposal). Thus, the Commission was not in a position to review that alternative until Pratt had dealt with those issues.

3. Pratt sued the Commission alleging, *inter alia*, that the evidence did not support the Commission's decision. Pratt also alleged that if the courts upheld the Commission's decision, then there were no beneficial uses remaining for Pratt's property, resulting in an uncompensated taking. The trial court first found that the evidence supported the Commission's decision to deny Pratt a coastal permit. App. at p. 5.

In ruling on the Commission's partial summary judgment motion addressing Pratt's takings claims, the trial court determined that those claims were not ripe because, unlike the situation in *Palazzolo v. Rhode Island*, *supra*, Pratt potentially could develop 20 percent of its property and, in the absence of a further application, no one could determine what the

value of development would be. App. at pp. 32-33. The trial court also found that it would not be futile for Pratt to reapply because the Commission had identified an alternative project that it potentially could approve. App. at pp. 33-34.

4. The California Court of Appeal affirmed the judgment. The Court of Appeal held that the evidence did support the Commission's decision to deny Pratt's permit application. App. at pp. 10-16.

As to Pratt's takings claims, the Court of Appeal applied this Court's precedents such as *Palazzolo* and *Williamson Planning Com. v. Hamilton Bank*, 473 U.S. 172 (1985). Based on those precedents, the Court of Appeal determined that Pratt's claims were not ripe because:

- Pratt had applied only once to subdivide Tract 1873;
- Twenty percent of the property (about 24 acres) remained available for development after the Commission's denial of Pratt's application;
- The Commission had identified an alternative project that potentially could be approved; and
- Pratt had never submitted a plan to develop the remaining 24 acres.

Reviewing these facts, the Court of Appeal held that the Commission had not made a final determination of the extent of development that would be allowed on

Pratt's property. Therefore, Pratt's takings claims were not ripe. App. at pp. 16-21.

5. Pratt's petition mischaracterizes the record on several points. On three occasions in its petition, Pratt refers to the opinion of its appraiser that "the regulations could actually limit use of the subject 124-acre tract to as little as *1120 square feet*." Petition (Pet.) at pp. 3-4, emphasis in original; *see also* Pet. at pp. 8, 16 fn. 6. Pratt's reliance on its appraiser is improper for four reasons. First, the appraiser was referring to the effect of an action that the County took in 2004 – four years after the Commission's action on Pratt's permit application. In 2004, the County adopted an amendment to its LCP. Pratt claimed that when this amendment was coupled with the Commission's interpretation of the LCP, then Pratt potentially had only 1120 square feet remaining that it could develop out of the 24 acres that remained after the Commission's denial of a permit for Tract 1873. Of course, Pratt did not present this information to the Commission in 2000 when it considered Pratt's application for a coastal permit, and therefore this information is not a part of the administrative record for this case. App. at p. 39.

Second, the appraiser offered his opinion in a vacuum. Pratt never applied for a permit for a project to which the LCP amendment applied. Thus, Pratt's appraiser was speculating on the effect of that amendment.

Third, pursuant to California law, a local government's amendment of its LCP does not become operative until the Commission approves it. Cal. Pub. Resources Code § 30514, subd. (a). Here, the Commission never approved the LCP amendment, and that amendment never became operative.

Finally, in its appeal, Pratt did not present any issues relating to the County's action. Pratt put this information before the trial court in 2005 in two post-trial motions. Although the trial court denied both motions, Pratt never challenged those rulings on appeal. App. at p. 39.

Pratt also asserts on several occasions that because the Commission's application of the LCP left Pratt with only 24 acres, or about 20 percent of the parcel, that the Commission had reduced the value of the property by 80 percent. Pet. at pp. i, 16. Pratt's assertion is misleading. There is no evidence in the record that establishes the value of the 24 acres that remain available for development or the value of any development on that land. Nor is there any evidence establishing that the value of development is directly proportional to the overall size of the property. Thus, Pratt's conclusion that the Commission's action reduced the value of the property by 80 percent is speculation.

Pratt's contention also is disingenuous because the permit that Pratt asked the Commission to approve would have required Pratt to protect 80 acres (or nearly 65 percent of the property) as open space.

Moreover, Pratt acquired a large portion of its property (43 acres) for the express purpose of using it as part of the open space.

In any event, Pratt has never submitted an application seeking to develop those 24 acres, and it is only in the context of such an application that the extent of permissible development (and its value) can be determined.

ARGUMENT

In reviewing Pratt's takings claims, the California Court of Appeal applied this Court's precedents and determined that those claims were not ripe for judicial review. Rather than conceding that this is a classic ripeness case that does not warrant review, Pratt attempts to manufacture a *Penn Central* issue that this case does not present. Pratt asserts that this Court's review is necessary because the lower courts are confused about how to apply the *Penn Central* factors for determining whether the application of a regulation constituted a regulatory taking. However, here neither the state Court of Appeal nor the trial court applied those factors. Instead, they properly found that Pratt's takings claims were not ripe. Therefore, this case is not an appropriate vehicle for addressing the *Penn Central* factors.

I. The *Penn Central* Test For A Taking Is Not A Part Of This Case.

Pratt argues that the lower courts are confused about how they should apply the ad hoc test for a taking that this Court developed in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Pet. at pp. 3-4, 10-18. Setting aside the question of whether the lower courts actually are confused, this case does not present an appropriate vehicle to consider that question because neither the trial court nor the Court of Appeal applied the *Penn Central* test. Because the lower courts here determined that Pratt's taking claims were not ripe, they had no need to examine the *Penn Central* factors or to determine whether a regulatory taking had occurred.

This Court has long refused to decide in the first instance issues that the lower courts did not decide. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001), citing *inter alia*, *Youakim v. Miller*, 425 U.S. 231 (1976). Here, Pratt did not argue in its briefs before the Court of Appeal that the trial court had improperly applied *Penn Central*. Nor did Pratt ask the Court of Appeal to apply the *Penn Central* test. Instead, Pratt argued that its claims were ripe and that it was entitled to a trial at which it could present evidence on the *Penn Central* factors. Even a brief review of the Court of Appeal decision reveals that the court did not reach or apply the *Penn Central* test.

Pratt attempts to avoid this conclusion by mischaracterizing the Court of Appeal's opinion. Pratt claims that the Court of Appeal determined, as a matter of law, that there cannot be a taking when a government regulation prevents development of 80 percent of a landowner's property. Pet. at p. 15. Pratt is wrong. Nowhere in its decision did the Court of Appeal address or purport to determine whether a taking had in fact occurred here. Rather, that court's entire discussion of takings law was in the context of ripeness. And in that context, the Court of Appeal noted that even if Pratt were correct that the Commission decision prevented development of 80 percent of Pratt's property, that left 24 acres available for development, and that no one knew the amount of development that the County or the Commission might permit on that acreage. On that basis, the Court of Appeal concluded that this case was very different from *Palazzolo*. App. at pp. 20-21.

Pratt claims that because it is unable to develop 80 percent of its property, the Commission has reduced the value of the property by 80 percent. Pet. at pp. 15-16. However, as noted earlier, Pratt itself proposed to develop only 35 percent of the property. Moreover, Pratt did not argue this to the Court of Appeal – for good reason. Because the lower courts resolved Pratt's takings claims on ripeness grounds, they had no need to apply the *Penn Central* factors or to take evidence on what the value of development on the remaining 24 acres would be.

In distinguishing the facts in *Palazzolo* from those here, the Court of Appeal noted that "it is far from determined how much development can occur on Pratt's property." App. at p. 21. That certainly is true. In fact, there is absolutely no evidence in the record on the value of Pratt's property, the value of the 24 acres that Pratt potentially can develop, or the value of any development on those 24 acres.

Pratt also cites to the last decision in the *Florida Rock* series of cases and compares the 73.1 percent diminution in value there to Pratt's speculative claim of a loss of 80 percent in value here. Pet. at p. 16. However, in that case, the Court of Federal Claims actually applied the *Penn Central* factors to find that there had been a diminution in value of 73.1 percent that resulted in a taking. *Florida Rock Indus., Inc. v. United States*, 45 Fed.Cl. 21, 32-44 (1999). Neither the trial court nor the Court of Appeal applied those factors here nor did they determine whether a regulatory taking had occurred. Therefore, this case is not an appropriate vehicle to review any claim relating to *Penn Central*.

II. The Court Of Appeal Correctly Determined That Pratt's Taking Claims Were Not Ripe.

A. Pratt's Takings Claims Are Not Ripe.

This Court's jurisprudence regarding whether a takings claim is ripe for judicial review is well-established. In *Palazzolo v. Rhode Island*, *supra*, 533

U.S. at p. 618, this Court explained that "a takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue.'" It is only when the responsible agencies have made a final decision on the permissible uses of the property that the landowner or the judiciary can determine whether the regulation has deprived the landowner of all economically beneficial uses of the property or whether a non-categorical taking has occurred. *Ibid.*; *see also Williamson Planning Com. v. Hamilton Bank*, *supra*, 473 U.S. at p. 186.

Thus, a final and authoritative determination of the type and intensity of legally permitted development on the property is an essential prerequisite to a party's assertion of a regulatory takings claim. A final and authoritative determination is necessary because the courts cannot determine whether a regulation has gone too far until they know how far it goes. *MacDonald, Sommer & Frates v. Yolo County*, *supra*, 477 U.S. at p. 348.

In this case, the Court of Appeal looked to *Palazzolo* and determined that Pratt's takings claims were not ripe because no one knew how much development might be allowed on the 24 acres that were not environmentally sensitive. As the Court of Appeal noted, "Here, unlike *Palazzolo*, it is far from determined how much development can occur on Pratt's property." App. at p. 21. The Court of Appeal was correct.

Pratt submitted a single application for a permit to subdivide Tract 1873 that the Commission denied because the application was inconsistent with the applicable standard, the LCP. In denying the application, the Commission noted that there was an alternative lot configuration that addressed the habitat and view issues and that potentially could be approved, subject to review by other agencies with jurisdiction over the project. However, Pratt has never submitted any further application for development of the property. These facts present a typical example of a takings claim that is not ripe.[1]

Indeed, this case is similar to *MacDonald*. There the plaintiff submitted a single development plan to divide his property into 159 residential parcels, and the county denied the application because it was inconsistent with its general plan. *MacDonald, Sommer & Frates*, *supra*, 477 U.S. at pp. 342-343. The plaintiff sued alleging that the county was restricting the property to open space by denying all development plans and that the permit denial appropriated

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[1] San Leandro Rock Co, Inc.'s amicus brief does not address the Court of Appeal decision in this case. Rather, San Leandro Rock asserts that final action on a development application should not be a necessary prerequisite of ripeness. San Leandro Br. at pp. 16-22. While San Leandro's issue might be of interest in some circumstances, this case does not present those circumstances. Pratt did apply for a permit, and after the Commission's denial, there is a complete lack of certainty about the scope and value of development of Pratt's property.

"the entire economic use" of the property. *Id.* at p. 344.

Notwithstanding those allegations (which are similar to Pratt's allegations here), the Court found the plaintiff's takings claim was not ripe because the plaintiff had not yet received the County's final determination regarding the actual scope of permissible development. There, as here, the government's decision left open the possibility that it would allow some development, and that possibility meant that the plaintiff's takings case was not ripe. *Id.* at pp. 351-353. The Court noted that the rejection of a large development plan did imply that a less ambitious plan could not be approved. *Id.* at p. 353 fn. 9.

Finally, Pratt never addressed the unresolved infrastructure issues for the project. That is, Pratt contemplated using septic systems to treat the sewage that development of Tract 1873 would create. In order to use septic systems, Pratt needed a permit from the Regional Board but never applied for one. However, if Pratt applies for that permit, the Regional Board can require that Pratt alter the configuration of the subdivision. Thus, at the time the Commission considered Pratt's application for Tract 1873 (and even now), neither Pratt nor the Commission knew what the final configuration of the subdivision would be. Nor did Pratt present evidence to the Commission on the availability of on-site water. In the absence of information on water supply and sewage disposal, no one can know the extent of permissible development on the property.

B. Pratt Cannot Avoid The Lack Of Ripeness Of Its Claims.

Pratt posits several arguments in an attempt to avoid the conclusion that its takings claims are not ripe. Pratt argues that the Commission's reasons for denying a permit to subdivide Tract 1873 will not change and then concludes that there is no need to waste time on additional applications. Pet. at pp. 24-25. What Pratt ignores is that even if the Commission's reasons for denying a permit to subdivide all of Tract 1873 will not change, Pratt still has about 24 acres that it potentially can develop. Pratt has not applied for a permit for a subdivision or any other development focused on that portion of the property. Moreover, the Commission identified an alternative project for that portion of the property that might be approved thus indicating, as the Court of Appeal noted, the Commission's willingness to consider alternatives. App. at p. 18. The record in this case establishes that the Commission has not closed the door to development on this property.[2]

Pratt argues that its takings claim is ripe because it spent many years before the County and

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[2] Pacific Legal Foundation argues that Pratt's takings claims are ripe as to the 80 percent of the property that is sensitive habitat. PLF Br. at p. 11. This Court has never allowed a party to divide its parcel in such a manner. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327, 330-331 (2002) [taking jurisprudence does not divide a single parcel into segments].

because it submitted an environmental impact report that reviewed ten alternative configurations of the development. Pet. at p. 23. Then Pratt makes a logical jump and claims that it should not make any legal difference whether an agency's consideration of alternative proposals comes in the form of separate permit applications or in the form of consideration of multiple configurations in a single application. Pet. at p. 25.

Basically, Pratt is asserting that it should be excused from the finality requirement. The effect of Pratt's argument is that the courts would become the zoning boards and would have to determine the permissible scope of development of Pratt's property. Here, Pratt would have the courts determine in the first instance planning matters such as the size and configuration of the lots, the adequacy of water supply and the means of sewage disposal. Putting the courts in this role is contrary to this Court's requirement that landowners follow the "reasonable and necessary steps to allow regulatory agencies to exercise their full discretion" in considering development of property. *Palazzolo*, *supra*, 533 U.S. at pp. 620-621. Here, neither the County nor the Commission has exercised their full discretion over development of Pratt's property.

Moreover, in making this argument, Pratt forgets that the alternatives analysis in an environmental impact report does not contain all the information that the Commission needs to determine whether the proposal is consistent with the LCP. Importantly

here, the alternatives analysis in the environmental impact report did not address the unresolved infrastructure issues regarding water supply and sewage disposal. No one could design a project without knowing how much water would be available or what sewage disposal method the Regional Board would approve. Pratt never supplied this essential information to the Commission.

Pratt's next argument is that because of the manner in which California law addresses coastal permits, Pratt may not have an opportunity to have the Commission review a redesigned project. Pet. at pp. 25-26. While that point is true, it is also trivial. Under the California Coastal Act, once the Commission certifies a local government's LCP, the State's coastal permitting authority is delegated to the local government. Cal. Pub. Resources Code § 30519, subd. (a). Some local government approvals of coastal permits are subject to appeal to the Commission, *id.* § 30603, but in the absence of an appeal, the Commission does not review locally-issued coastal permits. Therefore, if a local government approves a project, and no appeal is filed, the permit becomes final without the need for any Commission action.[3]

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[3] In its amicus brief, Matteoni, O'Laughlin & Hechtman asserts that the permit approval process that the Coastal Act created is unfair and that this Court should grant the petition to review that process. Matteoni Br. at p. 15. However, Pratt does not claim that the approval process was unfair or seek review of

(Continued on following page)

If Pratt were to apply to the County for a new project, there could be several outcomes. First, the County could approve Pratt's application. If no one appealed that decision to the Commission, Pratt would have a final permit authorizing its development project. If someone did appeal the County's approval to the Commission, the Commission also could approve a permit for Pratt giving it authorization to develop.

Second, if the County does not approve a permit for Pratt, Pratt could seek judicial review of that action. And if someone did appeal a County approval to the Commission and the Commission denied a permit, Pratt could seek judicial review of that action.

The fact that, if Pratt does apply again, these different outcomes exist does not mean that Pratt has a ripe takings claim against the Commission now. No governmental entity has made any final determination of the permissible uses of the Pratt property. And in the absence of a new permit application from Pratt, no governmental entity will be able to make any further determinations about the permissible uses.

Pratt also claims that Tract 1873 has been in the regulatory process for 30 years. Pet. at p. 27. As the Court of Appeal noted, that is not true. App. at p. 20. In the 1970s, Pratt applied to the County for a

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that process. Instead, Pratt wants to be excused from having to follow that process.

subdivision map for some of the property contained in Tract 1873. However, Pratt allowed the preliminary map to expire and did not pursue any development for that property for over a decade, that is, until it applied for a permit to subdivide Tract 1873. While Tract 1873 contains the property that was included in the earlier map, Tract 1873 also contains other property and was a completely new project. App. at p. 4. Thus it is not true that Tract 1873 has been in the regulatory process for 30 years.

Finally, this case is not like *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). In summarizing the situation in *Del Monte Dunes*, this Court stated, "After five years, five formal decisions, and 19 different site plans, . . . Del Monte Dunes decided that the city would not permit development of the property under any circumstances." *Id.*, p. 698. Here, Pratt has applied once for a permit to subdivide Tract 1873 and has been denied once. And in its denial, the Commission indicated a proposal that potentially could be approved – the Planning Commission-approved version of the project. However, in light of the unresolved issues regarding water supply and sewage disposal, the Commission was not in a position to take any action on that version of the project.

In sum, there are a variety of reasons why Pratt's takings claims are premature. After reviewing the record here, the Court of Appeal properly found that those claims were not ripe for review.

III. The Court Of Appeal Did Not Hold That The Absence Of Water On The Property Precluded A Taking.

Pratt's final argument is that the Court of Appeal justified the Commission decision by asserting the Commission had a valid basis for its decision. In this regard, Pratt singles out the Court of Appeal's comment that it was the lack of water on the property that caused Pratt harm. Pet. at pp. 18-21.

In making this argument, Pratt takes the Court of Appeal's comment out of context. First, the Court of Appeal stated that while the Commission concluded that this 41-unit subdivision was inappropriate, the Commission did not decide that it could not approve a less intense project. App. at p. 18. And the Court of Appeal noted that "Pratt has simply failed to demonstrate with sufficient certainty that its proposed 41-unit subdivision will have an adequate supply of water. Without such a demonstration, the extent of development . . . cannot be determined." App. at p. 19.

In looking at the record, the Court of Appeal observed, in dicta:

> Moreover, Pratt cites no authority that the denial of a development permit because of insufficient water supply constitutes a taking. Nor does Pratt cite authority that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. Even where the lack of water deprives a parcel owner of all economically beneficial use, it

> is the lack of water, not a regulation, that causes the harm.

App. at p. 19. The Court of Appeal made these comments in the context of determining that Pratt's takings claims were not ripe for judicial review. Notably, Pratt did not present any issue on this point in its petition seeking California Supreme Court review.

In any event, the Court of Appeal's comment merely reflects the reality about water supply in California. Water is scarce. Indeed, the California Constitution grants the Legislature great flexibility in determining how to protect this scarce resource. *In re Waters of Long Valley Creek System*, 599 P.2d 656, 663 (Cal. 1979); *see also Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 804 (1976) [most critical problem for the Southwest is the scarcity of water].

Finally, Pratt's complaint about lacking water is incongruous in light of what it told the trial court in opposing the Commission's motion seeking dismissal of Pratt's takings claims. In a declaration in opposition to the Commission's motion, Pratt's engineer stated:

> If the commission required on-site water service, this can be easily provided. . . . A previously drilled well which produced potable water . . . had been drilled many years ago and is located near lot 9 of Tract 1873. Such a well is capable of producing all the domestic water needs of the proposed project. . . .

6 Clerk's Transcript 1547, 1615-1616.

Pratt never presented this information to the Commission when it was considering Pratt's permit application. Indeed, Pratt presented no information to the Commission about the availability of water on the property. If Pratt applies for another coastal permit, presumably it will provide evidence on this subject because such evidence could alter the County's or the Commission's conclusions about the scope of permissible development on the property.

In any event, Pratt's claim now that the lower court cavalierly denied Pratt a trial on its takings claims based on the "rectitude of the regulatory purpose" (Pet. at p. 21) is a serious distortion the Court of Appeal's decision. And Pratt's argument ignores its own contentions in the trial court regarding water supply.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX "A"

California Public Resources Code

***Section 30514* Program amendment; commission certification; procedure; minor or de minimis amendments; amendments requiring rapid action; guidelines**

(a) A certified local coastal program and all local implementing ordinances, regulations, and other actions may be amended by the appropriate local government, but no such amendment shall take effect until it has been certified by the commission.

(b) Any proposed amendments to a certified local coastal program shall be submitted to, and processed by, the commission in accordance with the applicable procedures and time limits specified in Sections 30512 and 30513, except that the commission shall make no determination as to whether a proposed amendment raises a substantial issue as to conformity with the policies of Chapter 3 (commencing with Section 30200) as would otherwise be required by Section 30512. In no event shall there be more than three of these submittals of proposed amendments in any calendar year. However, there are no limitations on the number of amendments included in each of the three submittals.

(c) The commission, by regulation, shall establish a procedure whereby proposed amendments to a certified local coastal program may be reviewed and designated by the executive director of the commission as being minor in nature or as requiring rapid

and expeditious action. That procedure shall include provisions authorizing local governments to propose amendments to the executive director for that review and designation. Proposed amendments that are designated as being minor in nature or as requiring rapid and expeditious action shall not be subject to subdivision (b) or Sections 30512 and 30513 and shall take effect on the 10th working day after designation. Amendments that allow changes in uses shall not be so designated.

(d)(1) The executive director may determine that a proposed local coastal program amendment is de minimis if the executive director determines that a proposed amendment would have no impact, either individually or cumulatively, on coastal resources, is consistent with the policies of Chapter 3 (commencing with Section 30200), and meets the following criteria:

(A) The local government, at least 21 days prior to the date of submitting the proposed amendment to the executive director, has provided public notice, and provided a copy to the commission, that specifies the dates and places where comments will be accepted on the proposed amendment, contains a brief description of the proposed amendment, and states the address where copies of the proposed amendment are available for public review, by one of the following procedures:

(i) Publication, not fewer times than required by Section 6061 of the Government Code, in a newspaper of general circulation in the area affected by

the proposed amendment. If more than one area will be affected, the notice shall be published in the newspaper of largest circulation from among the newspapers of general circulation in those areas.

(ii) Posting of the notice by the local government both onsite and offsite in the area affected by the proposed amendment.

(iii) Direct mailing to the owners and occupants of contiguous property shown on the latest equalized assessment roll.

(B) The proposed amendment does not propose any change in land use or water uses or any change in the allowable use of property.

(2) At the time that the local government submits the proposed amendment to the executive director, the local government shall also submit to the executive director any public comments that were received during the comment period provided pursuant to subparagraph (A) of paragraph (1).

(3)(A) The executive director shall make a determination as to whether the proposed amendment is de minimis within 10 working days of the date of submittal by the local government. If the proposed amendment is determined to be de minimis, the proposed amendment shall be noticed in the agenda of the next regularly scheduled meeting of the commission, in accordance with Section 11125 of the Government Code, and any public comments

forwarded by the local government shall be made available to the members of the commission.

(B) If three members of the commission object to the executive director's determination that the proposed amendment is de minimis, the proposed amendment shall be set for public hearing in accordance with the procedures specified in subdivision (b), or as specified in subdivision (c) if applicable, as determined by the executive director, or, at the request of the local government, returned to the local government. If set for public hearing under subdivision (b), the time requirements set by Sections 30512 and 30513 shall commence from the date on which the objection to the de minimis designation was made.

(C) If three or more members of the commission do not object to the de minimis determination, the de minimis local coastal program amendment shall become part of the certified local coastal program 10 days after the date of the commission meeting.

(4) The commission, after a noticed public hearing, may adopt guidelines to implement this subdivision, which shall be exempt from review by the Office of Administrative Law and from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The commission shall file any guidelines adopted pursuant to this paragraph with the Office of Administrative Law.

(e) For purposes of this section, "amendment of a certified local coastal program" includes, but is not limited to, any action by a local government that authorizes the use of a parcel of land other than a use that is designated in the certified local coastal program as a permitted use of the parcel.

Section 30519 **Delegation of development review authority; recommendation of amendments to program**

(a) Except for appeals to the commission, as provided in Section 30603, after a local coastal program, or any portion thereof, has been certified and all implementing actions with the area affected have become effective, the development review authority provided for in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof.

(b) Subdivision (a) shall not apply to any development proposed or undertaken on any tidelands, submerged lands, or on public trust lands, whether filled or unfilled, lying within the coastal zone, nor shall it apply to any development proposed or undertaken within ports covered by Chapter 8 (commencing with Section 30700) or within any state university or college within the coastal zone; however, this

section shall apply to any development proposed or undertaken by a port or harbor district or authority on lands or waters granted by the Legislature to a local government whose certified local coastal program includes the specific development plans for such district or authority.

(c) The commission may, from time to time, recommend to the appropriate local government local coastal program amendments to accommodate uses of greater than local importance, which uses are not permitted by the applicable certified local coastal program. These uses may be listed generally or the commission may recommend specific uses of greater than local importance for consideration by the appropriate local government.

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No. 08-668

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate Dist., Div. 6

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition is liberally salted with Respondent California Coastal Commission's assertions of what it refers to as the "facts" (e.g., pp. 5, 11) as well as disparagement of the presentation in the Petition as having "no evidence" (e.g., pp. 7, 11) behind it.

The Brief in Opposition thus highlights the problem that calls for the Court's review: *there has been no trial to establish the facts* and the courts below turned what should have been an evidentiary trial into assumptions supposedly made as a matter of law. Building on those deficiencies in the lower courts' rulings, the Commission's brief substitutes self-serving prose and misdirected invective toward Petitioner's counsel in place of a due process proceeding in which the facts of the controversy — not just counsel's argumentation — are presented as proper evidence to an impartial trier of fact.

In light of the standard the Court has established for deciding regulatory taking cases (i.e., "*ad hoc*" factual determinations [see Pet., pp. 10-18]), an inquiry into

evidence is essential. Lower courts that are hostile to private property rights fail or refuse to understand that basic notion, thus showing the need for corrective action by this Court.

As shown in the Petition, the Court's decisions hold that each regulatory taking case must be decided "*ad hoc*" on its own facts. (E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978].) Of necessity, *that* can only be done after trial, with the presentation and evaluation of evidence.

That *ad hoc* approach operates in both of the issues presented here:

- First, it is key in the determination of whether a taking has occurred, because an *ad hoc* standard cannot rationally be applied until the full factual record of the specific case at issue can be examined at trial.

- Second, it is also the key in the finality/ripeness determination required by *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985). Just as the substantive facts will vary from case to case, so too the procedural aspects will

vary and need to be examined on their own. The finality/ripeness question is whether it can be said with a "reasonable degree of certainty" (*Palazzolo v. Rhode Island*, 533 U.S. 606, 620 [2001]) — not absolute, but reasonable, certainty — that the regulator has made its "final" decision known. Reasonableness determinations are inherently fact based.

I.

AD HOC FACTUAL ANALYSIS REQUIRES AN *AD HOC* FACTUAL EXAMINATION OF EVIDENCE AT TRIAL.

The Commission evidently understands how out of sync it is to say (a) that the test to determine whether there has been a regulatory taking is the *ad hoc* mode of analysis described in *Penn Central*, but then (b) decide the matter without having a trial to determine *ad hoc* what those facts are. Thus, the Commission baldly asserts (p. 9) that there was no application of *Penn Central* below.

That simply defies the record. The Court of Appeal explained the *Penn Central* test

(App. 16) and then used the same dual mode of decision that the Rhode Island Supreme Court tried unsuccessfully to use in *Palazzolo*, where, it held that the matter was not ripe, but if it were ripe, the owner would have lost on the merits. (See *Palazzolo*, 533 U.S. at 616.) Here, the court below found lack of ripeness and then also found no taking because "[a]ssuming Pratt's claim is true, that leaves 20 percent of the 121-acre tract, over 24 acres, available for development." (App. 17.)

This Court saw through that ploy in *Palazzolo* (finding ripeness and remanding for a determination of whether a taking occurred), and it should do so here as well. Beyond that, the Court needs to clearly direct lower courts that the way to make *ad hoc* factual determinations is to hold trials.

The legal problem with the conclusion below is that it *assumes as a matter of law* that leaving 20% of the property "available" (whatever that actually signifies in the absence of any evidence) means there *could be* no *Penn Central* taking. The more real problem — in the *ad hoc* factual world of *Penn Central* — is that the abstract assertion that Pratt has 20% of the land

"available for development" has not been proved.

All that the record currently shows is that at least 80% of the property was definitely *precluded* from development. Instead of demanding proof of what *could* be developed, the court below simply inverted that prohibition and *assumed* that the remaining 20% must be *available* for private use. [1] But there is no evidence of that. No one disputed that 80% (at least) of the land could not be used. But no such agreement existed as to the remaining 20%. That is why Pratt has insisted throughout that a trial is needed to determine the actual impact of the regulations and the

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[1] That is the Coastal Commission's mantra here, as well. See, e.g., Br. in Opp., p. 15, where the Commission asserts that "Pratt still has about 24 acres that it potentially can develop." Pratt's complaint alleges that it cannot do so, and its post-trial efforts to show the trial court the County's refusal to process further applications aptly demonstrate the futility of seeking more "process" from the government agencies. A trial, with evidence, would prove that. But the courts below would not allow trial.

actual (as opposed to conjectural) utility of such a development.

Trial would put the parties to their proof. And that is the point. Embedded in the decision below is the *assumption* that 20% of Pratt's land can still be put to productive private use, though no one can tell how. The point of citing the appraiser's affidavit (denigrated by the Coastal Commission at Br. in Opp., p. 6) was simply to show that the 20% solution was neither automatic nor undisputed. That appraisal testimony raised a question that could have been resolved by trial, had there been one.[2]

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[2] Some of the Commission's factual assertions disregard reality. For example, the Commission asserts that it is "not true that Tract 1873 has been in the regulatory process for 30 years" (Br. in Opp., p. 19), as though that somehow disproves that the bulk of the *property* in that proposed tract is part of the Pratt ownership that has been the subject of development proposals for more than 30 years. Both the Court of Appeal's opinion (App. 2-3) and the Commission's Brief in Opposition (p. 1) show the County's conceptual approval of 149 homes on 81 of these 124 acres in 1973 — 36 years, by our calendar.

To the same effect is the Commission's discussion of *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 [1999].) In the Petition, Pratt contrasted *Florida Rock*'s finding of a taking caused by a 73.1% reduction in value, with the ruling below that there was no taking as a matter of law when at least 80% of the property has been rendered undevelopable. (Compare Pet., p. 16 with Br. in Opp., p. 11.)

But the Commission's argument that those two percentages are not comparable proves too much. A blanket prohibition of development on *at least* 80% of Pratt's property at least raises a question of fact as to its economic impact — the key *Penn Central* factor. The Commission's *assumption* that there is not sufficient impact to cause a taking is something that requires evidentiary proof, not counsel's argument in a brief, or a bald assertion by a lower court. *Florida Rock* was decided after multiple and extensive trials.

The Commission's assertion that Pratt "did not argue" the *Penn Central* issue below (p. 10) again defies the record. Pratt devoted a substantial section of its Court of Appeal brief to the argument that the

Commission's actions had "such a severe impact under the *Penn Central* formulation that compensation is mandated." (AOB 39 *et seq.*) The same *Penn Central* issue presented here was also raised in Pratt's Petition for Review to the California Supreme Court. (Pet. for Rev., p. 2.)

II.

THE DECISION BELOW — AS A MATTER OF LAW — CONFLICTS WITH SETTLED DECISIONS OF THIS COURT

In a brief phrase, the court below eliminated the basis for much of this Court's regulatory taking jurisprudence. The court below found there *could be no taking* because "it is the lack of water, not a regulation, that causes the harm." (App. 19.) That is contrary to numerous decisions of this Court (discussed at Pet., pp. 19-21) holding that takings could be found because of regulations based on the possible impact of development on endangered species or coastal access or natural resources. In each case, the Court could have said that it was the presence of the resource or the species, not the regulation, that caused the potential

problem. It could have, but it did not. It recognized that the impact of the regulation could violate the constitutional protection of private property and mandate public acquisition in order to protect the resource for the public benefit. As the Court summarized in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005), "the Takings Clause presupposes that the government has acted pursuant to a valid public purpose." Thus, the fact — if proved at trial — that "lack of water" provided a reason for the government action merely fortifies the takings claim by showing a public purpose for the action. It cannot eliminate the claim. Besides, the regulatory body concerned with such matters — the County — found no fault with water availability and approved Pratt's proposal.[3]

The Commission's response evades the issue, asserting either that the court below did no such thing, or Pratt did not raise the

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[3] The Commission's comment that Pratt did not present issues relating to the County's action (Br. in Opp., p. 7) is as irrelevant as it is bewildering. The County approved the project. Pratt's dispute was with the Commission.

issue in the California Supreme Court, or that water allocation is an important issue. (Br. in Opp., pp. 21-22.)

Wrong. First, the court below said what it said. That cannot be taken back at this point. And what it said is contrary to the theory of this Court's decisions. Second, Pratt raised this precise issue, arguing below, for example that "the Court of Appeal's rationale would eliminate constitutional liability for all regulations — overturning, in the process, each of the U.S. Supreme Court's decisions to the contrary." (Pet. for Rev., p. 21.)

III.

THE GAME ELEMENT MUST BE REMOVED FROM RIPENESS DECISIONS

The Commission's defense of the decision below distorts the Petition. Pratt is not "asserting that it should be excused from the finality requirements" of *Williamson County* (Br. in Opp., p. 16). Pratt's position is that it satisfied any rational meaning of the concept of finality, and that multiple project applications and rejections are not

the only way to demonstrate fulfillment of that requirement.

Even the truncated record considered below shows that, during the nearly decade-long process that Pratt endured with the County planners before a plan was finally approved at that level, Pratt and the County considered ten alternative ways to use the subject property. On administrative appeal, *the Coastal Commission rejected all ten alternatives.* In the Commission's own words, none of the ten was even close enough to approve with minor modifications because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

Thus, Pratt seeks not to be excused from finality, but a holding from this Court that finality can be reached in different ways, depending on the *ad hoc* factual circumstances of each case. Nothing in the Court's ripeness jurisprudence mandates multiple applications "for their own sake." (*Palazzolo*, 533 U.S. at 622.) Making multiple unsuccessful development applications is merely one way to demonstrate finality. Here, one lengthy and

extensive review of ten different ways to develop a single parcel of property should suffice *at least* to require a trial to determine whether that rejection of multiple alternatives shows either finality or the futility of proceeding further.[4]

In rejecting Pratt's development, the Commission made extensive findings demonstrating its hostility to developing this property, starting with equating "development" with "habitat degradation." (19 AR 3190) The Commission also found (1) it is important to maintain the Pratt property as a scenic backdrop for other homes already developed between this property and the ocean, on the evident theory that bare land is more attractive than looking at homes on someone else's property; (2) that subdivision of a small

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[4] The Commission's argument about the coastal permitting process (Br. in Opp., p. 17) is purely diversionary. It was the courts below that made an issue of the fact that the Commission had only reviewed Pratt's development plans once. (App. 20.) In this *ad hoc* context, that should not matter. The Coastal Commission seems now to agree, calling the issue "trivial." (Br. in Opp., p. 17.)

parcel in this part of the coast into as few as three home sites would set a bad developmental precedent; (3) that the property must be reserved for endangered species which had never been seen on it; and (4) that water could not be imported to support development. If the Coastal Commission wants to dispute any of those allegations or to demonstrate why they should not matter, the place to do that is at trial. As a matter of complaint allegations, these charges should suffice to put at issue the question of finality.

Otherwise, ripeness determination turns into a game consisting of the regulatory body suggesting that no matter what the property owner does, there is *always* something else that should have been done or that the regulator might do in the future if only the property owner asks in the right way.

The point is simply this: nearly a quarter-century after *Williamson County*, virtually all regulators have learned to evade its holding by *saying* that they are always open to alternative development

ideas[5] — whether that is actually true or not. In the context of *Penn Central*'s *ad hoc* factual examination rule, coupled with *Williamson County*'s desire for a "reasonable degree" of certainty (see *Palazzolo*, 533 U.S. at 620),[6] the *proof* of finality should depend upon evidence, not the mere assertion by an interested litigant that it retains discretion that might be exercised to permit development, regardless of historical evidence to the contrary.

Until this Court clearly requires that all such issues be decided on their merits, its *ad hoc* factual rule laid down in *Penn Central* and reiterated numerous times since then, will be reduced to nice words on paper and nothing more.

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[5] And they are advised to do so in most cases. See, e.g., Douglas T. Kendall, Timothy J. Dowling & Andrew W. Schwartz, Takings Litigation Handbook 88 (2000) (advising government lawyers to stress to courts that their clients retain discretion to allow use and might so exercise it).

[6] "Reasonableness" is always a question of degree. (See, e.g., *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 [2003].)

CONCLUSION

Certiorari is necessary and Pratt prays that it be granted.

Respectfully submitted,

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IN THE
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CHARLES A. PRATT CONSTRUCTION CO., INC.,
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v.
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To the California Court of Appeal
Second Appellate Distr. Div. 6

BRIEF OF MATTEONI, O'LAUGHLIN & HECHTMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

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INTEREST OF THE *AMICI CURAE*[1]

Amici are attorneys practicing law in the state of California. The firm's emphasis is on eminent domain, inverse condemnation, and land use. The firm principal, Norman E. Matteoni, is the primary author of California's Continuing Education of the Bar publication, *Condemnation Practice in California,* published annually since 1973.

Amici represent clients who have meritorious regulatory takings claims. Moreover, *amici* are familiar with the litigation of inverse condemnation cases and the fact-intensive nature of this inquiry. Accordingly, *amici* bring a practical as well as a legal perspective to the systemic imbalances that preclude an injured party from presenting a meritorious claim, to protecting their federally protected property rights.

Amici write this brief because a grant of review and reversal in this case will eliminate the chilling effects produced by the failure of lower courts to

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity, other than the *amici*, made monitory contribution to the preparation and submission of this brief. The parties have consented to the filing of *amicus* briefs in connection with the petition for certiorari, and they filed letters reflecting consent, with the clerk. Notice was provided to the respondent that *amice* would be filing this brief.

adhere to this Court's directives contained in *Penn Central*, and improper expansion and application of the ripeness doctrines to exclude meritorious claims.

ARGUMENT

1. Review Is Needed To Make Explicit That Fifth Amendment Regulatory Taking Claims Raise Serious Constitutional Issues That Are Predominately Factual Questions Requiring A Trial On the Merits.

As recently as 2005 this Court reiterated that the proper focus in a regulatory taking claim is upon the "severity of the burden that the government imposes upon private property rights." (*Lingle v. Chevron USA*, 544 U.S. 528, 539 (2005).) The Court went on to specifically reject the "substantially advances" test of *Agins v. City of Tiburon* 477 U.S. 255 (1980) on the premise that such a test "tells us nothing about the actual burden imposed on property rights, or how the burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." (*Lingle*, 544 U.S. at 543.) Thus, the Court was explicit that the proper focus is on a challenged regulations effect on a private owner.

Unfortunately, many lower courts have the analysis reversed and focus on whether or not the purpose of the regulation is a reasonable legislative act without any regard to the impact on an individual owner. In the present case, the court below focused on the reasonableness of the Coastal Commission's decisions without any regard for the impact on the landowner, Charles Pratt Construction Co, Inc. ("Pratt"). This is at odds with takings jurisprudence since valid regulations enacted for reasonable or even beneficial public purposes still requires compensation if private property rights are violated. (*Lingle*, 544 U.S. at 543 [Owner of property subject to a regulation that serves a legitimate state interest may still suffer a taking.].)

If the focus of regulatory takings analysis is to evaluate the impact of a regulation on individual owners then the individual owners must be guaranteed an opportunity to have a trial on the merits. This Court's decisions have recognized that "regulatory takings jurisprudence is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central Transportation Company v. City of New York* 438 U.S. 104, 124 (1978) designed to allow 'careful examination and weighing of all the relevant circumstances.'" (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* 535 U.S. 302, 322 (2002) quoting *Palazzolo v. Rhode Island*, 533 U.S., 606, 636, (O'CONNOR, J., concurring).) As

recently as 2005 the Court reiterated, that the *Penn Central* factors remain valid and that the Court has hereto been "unable to develop any set formula for evaluating regulatory taking claims." *Lingle v. Chevron*, 544 U.S. at 538-539.

Yet, too often lower courts have ignored the directive of *Penn Central* that regulatory takings are a factual question that can only be resolved after examining the relevant facts and circumstances. Despite this Court's admonitions lower courts still need explicit direction that regulatory takings claims are fact intensive inquiries raising serious constitutional issues which makes regulatory takings claims woefully inappropriate for summary adjudication.

In the instant case, the court below appointed itself the judge, jury, land use expert and apparently the appraiser to determine from the pleadings that 20% of the property remained potentially developable, so there was no taking as a matter of law. The court reached this conclusion despite the fact that Pratt's appraiser opined that the regulations could limit the allowable use of the 124 acre site to as little as 1120 sq. ft. (Judgment and Ruling of California Superior Court, Appendix B, page 22 of Petition for a Writ of Certiorari.) Such a cursory application of selective facts contained in the pleadings directly contradicts this Court's

admonitions to avoid set formulas and instead analyze the relevant facts. (*Palazzolo v. Rhode Island* 533 U.S. 606, 636. ["The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context to eschew set formulas and to apply a *ad hoc* factual inquiry."].)

The court below precluded Pratt from presenting evidence of the impacts of the Coastal Commission's actions. This outcome cannot be reconciled with the takings jurisprudence of this Court and certiorari should be granted so the Court can give guidance that, under *Penn Central*, regulatory takings require an analysis of the facts and that analysis requires a trial on the merits. A trial on merits would result in a judicial decision based on evidence presented by appraisers, planners and other experts. Not a decision based on the trial court making a cursory, "gut reaction" without reference to any testimony or factual development.

2. REVIEW IS NEEDED TO GIVE DIRECTION TO FEDERAL AND STATE COURTS THAT REGULATORY TAKING CLAIMS RAISE IMPORTANT CONSTITUTIONAL QUESTIONS THAT CANNOT BE EVADED BY INDISCRIMINATARILY APPLYING AND ENLARGING THE "RIPENESS" REQUIREMENT.

It is fairly evident reviewing the federal circuits that the ripeness requirement has become an "escape hatch" for those courts who do not believe that regulatory takings claims raise important constitutional questions. Numerous federal decisions have expressed disdain for regulatory or land use cases as reducing the court to a local zoning board. (*Spence v. Zimmerman 873* F.2d 256, 262 (11th Cir. 1989); *Littlefield v. City of Afton* 785 F.2d 596, 607 (8th Cir. 1986); see also Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases,* 10 Journal of Land Use and Environmental Law 91[1994].)

This bias against landowners and their regulatory taking claims has been summarized and repeated by the Ninth Circuit which explain that it was the job of the courts to make it difficult to open the federal courthouse court for relief from State and local land use decisions (*Hoenhne v. County of San Benito* 870 F.2d 529, 533 (9th Cir. 1989); *Dodd v.*

Hood River Cty. 136 F.3d 1219, 1230 (9th Cir. ,1998) [The Courts of Appeals were not created to be "the Grand Mufti of local zoning boards," *Hochne ,supra* at 532 , nor do they "sit as [ ] super zoning board[s] or [ ] zoning board[s] of appeals." *Raskiewicz v. Town of New Boston,* 754 F.2d 38, 44 (1st Cir.1985).]

The impact of this express bias in federal decisions has resulted in a judicial inference that regulatory taking claims are less important than other constitutional challenges. (*Coniston Corp. v. Village of Hoffman Estates* 844 F.2d 461, 467 (7th Cir 1988)[allegations of Fifth and Fourteenth Amendment violations represent "garden variety zoning disputes dressed up in the trappings of Constitutional Law"]; Overstreet, *supra,* 10 Journal of Land Use and Environmental Law at 92.)

Unfortunately, the state courts have picked up on the federal judiciary's hostility to regulatory takings claims and are mimicking this hostility by either invoking or expanding federal ripeness requirements or creating expansive state ripeness requirements.[2]

In the present case, the Court is faced with application of the federal ripeness requirements as

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[2] (See Overstreet, *Id.* at 134 for discussion of ripeness holdings from Illinois, Michigan, New Hampshire, New York, Pennsylvania, Rhode Island, Virginia and Washington.)

the court below based its ripeness decision on *Toigo v. Town of Ross* 70 Cal. App.4th 309, 329 (1998). *Toigo* at page 325 cites to *Williamson Planning Comm'n v. Hamilton Bank* 473 US 172 (1985) for the basis of California's ripeness doctrine.

The practical reality of this judicial hostility to regulatory takings and the willingness of the courts to expand the ripeness doctrine beyond its logical boundaries has not been lost on governmental agencies. These agencies see the ripeness doctrine as a shield that insulates an agency from rarely, if ever, being held accountable for its actions. Thus, the ripeness doctrine has actually given government agencies an incentive to create a complicated procedural maze that effectively prevents a legitimate claim from ever ripening thereby limiting any liability for the Agency's conduct. Unfortunately, an owner in today's regulatory environment is likely to be bankrupted by the government review process before their constitutional claim can ever ripen.

It is true that this Court presumably has addressed this issue of unfair delay in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698,(1999) ["Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."] Unfortunately, like *Penn*

Central, lower courts including the lower court in the present case have routinely ignored this Court's direction and instead focus on the fact that there were 5 formal decisions and 19 site plans submitted in *Del Monte Dunes* to distinguish it. The courts fixate on the number of applications submitted and not on the fairness of the process which is the underpinning of this Court's takings jurisprudence. (*Penn Central*, 438 U.S. at 123-124 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, (1960)) ["We have recognized that this constitutional guarantee is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"].)

The ripeness requirement and its "more than one application" prong is being used indiscriminately by lower courts without any regard for fairness and justice. Certiorari is necessary to rein in this imbalance and require that courts review the approval process to insure that the land use procedures are not an unfair maze aimed at thwarting claims from ever ripening.

The present case is an apt example of a procedural maze and the devastating impact that mechanically applying the ripeness requirement has on an owner. Even though Pratt had spent almost a decade pursuing its project and in that process had

analyzed ten different alternatives (all of which were rejected by the Coastal Commission) the court below ruled Pratt was required to do more before its claim could ripen. This, despite the fact that the Coastal Commission expressly concluded that it could offer no suggestions on how to modify the project to make it acceptable and rejected it in its entirety.

The unfairness of the ripeness decision becomes even more apparent when one considers the thoroughness of the environmental review process that the project and its ten alternatives had already been subjected to. The notion that Pratt needs to submit a new proposal so that the court is able to determine the full extent of the regulation is comical in light of the extensive analysis and numerous alternatives that were considered and rejected. The court's belief that it would be unable to determine the full extent of the regulation without a further application does not withstand scrutiny.

California Environmental Quality Act (Public Resource Code Sections 21000-21177; ("CEQA")) is commonly referred to as CEQA and is a comprehensive, environmental review process. CEQA requires an environmental impact report ("EIR") for any project and requires that the EIR describe and analyze a project's significant environmental affects, mitigation measures, and alternatives.

An EIR is the primary means of achieving the policy goals that approving entities "take all action necessary to protect, rehabilitate and enhance the environmental quality of the state." (Cal. Pub. Res. Code Section 21001(a).) The statutory purposes of an EIR are to provide public agencies and the public with a detailed analysis of the affects that a project is likely to have; list measures that will minimize the significant impacts of a project; and identify alternatives to the proposed projects. (Cal. Pub. Res. Code Sections 21002, 21002.1(a), 21061.)

An EIR is a very costly undertaking for an owner and is a very extensive analysis that requires many items to be addressed including the following:

- A project description containing sufficient information about the project to allow a complete evaluation and review of the environmental impacts (14 Cal. Code Reg. Section 15124);

- A description of the existing environment in the vicinity of the project from both a local and regional perspective and the project's impact on any environmental resources (14 Cal. Code Reg. Section 15125(a), and 15125(c));

- A description of the project's significant environmental effects including direct, indirect and long-term effects as well as any possible

environmental impacts that were found to be insignificant (Cal. Pub. Res. Code Section 2100(b)(1); 14 Cal. Code Reg. Section 15126.2(a));

- A discussion and analysis of significant cumulative impacts considering the project in relation to existing and anticipated projects; (14 Cal. Code Reg. Section 15130(a)(b));

- A list identifying and describing feasible measures that can be implemented to reduce or avoid each potentially significant environmental effect of the project (Cal. Pub. Res. Code Section 21100(b)(3); 14 Cal. Code Reg. Section 15126.4(a)(1));

- A description of a reasonable range of alternatives to the project or to its location that could reduce or avoid the significant impacts of the proposed project. This analysis requires a comparative evaluation of each alternative. (Cal. Pub. Res. Code Section 21100(b)(4); 14 Cal. Code Reg. Section 15126.6(a)-(e));

- An examination of whether a project will lead to economic or population growth or encourage development or other activities that could affect the environment. (Cal. Pub. Res. Code Section 21100(b)(5));

- An explanation of all potentially significant impacts that cannot be mitigated and are therefore are unavoidable and the implications of these impacts and the reason the project is being proposed despite these effects. (Cal. Pub. Res. Code Section 21100(b)(2)(A); 14 Cal. Code Reg. Sections 15126(b) and 15126.2(b));

The EIR before to the Coastal Commission in support of Pratt's project was an extensive analytical and fact-filled report discussing no less than 10 alternatives. The very purpose of an EIR's discussions of alternative and mitigation measures is to identify ways to reduce or avoid significant environmental effect. (*Laurel Heights Improvement Association v. Regents of the University of California* 47 Cal.3d. 376, 403 (1988).) By law the alternatives discussed in an EIR should be ones that offers substantial environmental advantages over the proposed project. (*Citizens of Lolita Valley v. Board of Supervisors* 52 Cal.3d 553, 556 (1990).) Moreover, a lead agency may eliminate from consideration potential alternatives that are incapable of reducing environmental impacts. (*Mann v. Community Redevelopment Agency* 233 Cal.App.3d 1143 (1991).) Importantly, an EIR need not consider alternatives that are not feasible. (14 Cal. Code Reg. Section 15126.6(a).)

Despite all of these alternatives contained in the EIR the court below determined the record was insufficient to determine the scope of the regulation. This mechanical application of the "one additional application" rule is unfair considering the circumstances of this case.

Pratt finds itself trapped in a bureaucratic maze where the County of San Luis Obispo is the lead agency that undertook the analysis of the EIR and developed the alternatives in conjunction with Pratt. It was the County that ultimately decided which alternatives to accept and to certify the EIR after extensive review. Yet, despite complying with California law and working with the local land use authority the Coastal Commission stepped in on appeal and rejected the proposed plan as well as all of Pratt's alternatives.

Now the Coastal Commission wishes to hide behind the ripeness doctrine to preclude a judicial challenge. Inexplicably, the court held that Pratt must submit again to determine what type of project the Coastal Commission would eventually approve. The procedural reality is that the Coastal Commission was sitting as the final appeal board and there is no way that Pratt can resubmit a project to the Commission or seek a variance from the Commission. Thus, the court is requiring that Pratt do what there is no statutory authority for it to

accomplish–resubmit to the Coastal Commission. (California Public Resource Code Section 30603.) This is the very type of unfair process that *Del Monte Dunes* requires be rejected by the courts. But, instead Pratt is stuck in regulatory limbo with no avenue to vindicate its rights under the lower court's mechanical and illogical application of the ripeness rules.

It is unfair and improper for local and state government to set up a process that can effectively preclude a party's claim from ripening after ten years of extensive analysis merely by transferring the appeal authority to a different entity. This result just encourages additional layers of bureaucracy to insure that the ripeness requirements can never be met. Certiorari should be granted and the Court must definitively state that where local and state governments have created an approval process that is so convoluted and oppressive that it cannot be allowed to destroy fundamental constitutional rights.

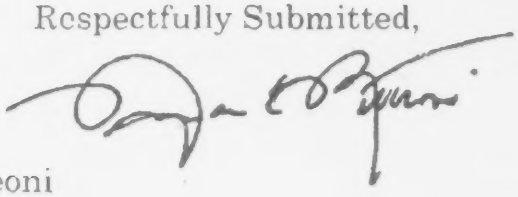
CONCLUSION

In a perfect world the planning and development process would be devoid of biases and every project would be entitled to a fair and equitable treatment. The reality is that bias exists and the ripeness doctrine has been improperly expanded and applied so that owners have very little protection

from overreaching by regulators. Regulators often ignore owner's rights shielded by the knowledge that the hurdles placed in front of each owner make any accountability highly unlikely.

Moreover, the current ripeness requirements are so misunderstood and have been so misapplied by the courts that potential litigants with valid constitutional claims cannot afford to risk meritorious litigation. This situation is exacerbated when the courts summarily adjudicate takings without adhering to the balancing of the individual facts and circumstances that a *Penn Central* analysis requires. The lack of consistent judicial treatment of regulatory takings claims is undercutting the constitutional guarantees afforded property owners and certiorari should be granted to address these problems.

Respectfully Submitted,



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In The
Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to provide a national advocate for the housing and shelter industry. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 235,000 members are homebuilders and/or remodelers, and its members build about 80 percent of the new homes produced each year in the United States.

NAHB is also a vigilant advocate for homebuilders in the nation's courts, and it frequently participates as a party litigant and amicus curiae to protect the property rights and interests of its members. NAHB was a petitioner, for example, in *NAHB v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007). Attached as Appendix A to this brief is a list of cases in which NAHB has appeared before this Court as amicus curiae or "of counsel." A significant number of those cases involved landowners and other parties aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The California Building Industry Association ("CBIA"), a state affiliate of NAHB, is a statewide trade association that represents approximately 5,600 members, including homebuilders, trade contractors, architects, engineers, designers, suppliers, and other industry professionals. CBIA members design and construct California's housing. CBIA's purpose is to advocate on behalf of the interests of its members, including representation in regulatory matters and in litigation affecting the ability of its members to provide housing, and office, industrial, and commercial facilities for residents of California.

Building Industry Legal Defense Foundation ("BILD") is a nonprofit, mutual benefit corporation and wholly controlled affiliate of the Building Industry Association of Southern California (BIA/SC). BIA/SC is a nonprofit trade association representing more than 1,700 member companies. The mission of BIA/SC is to promote and protect the building industry, and aid in its members' efforts to provide homes for all Southern California. BILD's purposes are to monitor developments in the law, to improve the business climate for the construction industry in Southern California, and to defend the legal rights of current and prospective home and property owners. To accomplish this mission, BILD participates in and supports litigation necessary for the protection of such rights, with special emphasis on cases having a regional or statewide significance.

Home Builders Association of Northern California ("HBANC") is a nonprofit association of more

than 800 members, representing the interests of homebuilders, home buyers, and thousands of employees throughout the San Francisco Bay Area. HBANC's members include builders, developers, contractors, sub-contractors, suppliers, architects, engineers, planners, and other professions and trades involved in providing housing opportunities for Californians in all income ranges, across a wide range of diverse communities.

Amici Curiae and the numerous homebuilders, land developers, and industry professional consultants that their respective organizations represent, are vitally concerned with providing much-needed housing to families in California and throughout the nation. To that end, homebuilders and land developers participate in and support intelligent and careful planning, involving local, regional, state, and federal agencies, to promote the approval of high-quality housing development.

The increasingly complex structure of the land use regulatory system stands as an obstacle to housing development. Against this backdrop, the holdings of this Court in *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978) and *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), have led increasingly to harsh and unfair rulings by lower courts on claims of regulatory takings by homebuilders and land developers. Further, many local jurisdictions hide behind the rulings in those two cases to create administrative delay, spuriously justify denials of

projects, and impose unreasonable conditions even when approving a project, thus stifling the provision and increasing the costs of housing.

The uncertainty produced by the *ad hoc* fact-based approach of *Penn Central,* and the *Williamson County* "final determination" test for ripeness review, have resulted in crippling delays and, in some cases, the abandonment of otherwise well-conceived and badly needed development projects. As noted by Professor Eagle:

> In the very nature of things, the enjoyment of property rights through the development of land into socially useful projects such as residential subdivisions, stores, offices, and entertainment centers is fraught with risk. In particular, delay is potentially ruinous to developers, since interest charges and taxes tick away, attorney fees pile up, and risks of weather, strikes, and changing markets are ever present. On the other hand, planners and municipal attorneys are paid from tax revenues. While not downplaying the legitimate governmental concern about takings liability, in almost all cases municipalities have far superior resources to withstand delays than landowners. Institutions that promote delay, like both the "final determination" and "state compensation" prongs of *Williamson County*, inject a systematic bias in favor of the regulator and against the regulated in all their dealings. This is why administrative delay remains a powerful tool.

Steven J. Eagle, *Regulatory Takings* § 8-6(f) at 1112 (3d ed. 2005).

The potential delay and uncertainty created by the holdings in *Penn Central* and *Williamson County* (among other factors) in many cases substantially add to the cost of housing, putting houses and even rents out of reach for too many Americans. *See generally,* John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8(1) Cityscape: A Journal of Policy Development and Research 69 (2005).

SUMMARY OF ARGUMENT

This case vividly demonstrates why this Court should reexamine and provide guidance regarding the three-prong test enunciated 30 years ago in *Penn Central* for determination of whether a regulatory taking has occurred. Since that time, there has been confusion in lower court rulings as to how to properly apply the *Penn Central* standards. In addition, government agencies have exploited the confusion in order to unjustifiably deny development project applications, but avoid regulatory takings claims.

The instant case presents just the latest example of the misuse of *Penn Central* to deprive a landowner of the ability to obtain judicial relief from a regulatory taking. After an exhaustive and expensive permitting process (more than eight years to obtain

approvals from San Luis Obispo County), the California Coastal Commission ("Coastal Commission"), relying on the ***County's*** Local Coastal Program ("LCP"), reversed the County's approval of a coastal development permit needed for the project, after another ten months of delay.

The record reveals beyond reasonable dispute that the Coastal Commission will not approve the project in any form that would meet reasonable investment-backed expectations. But the lower courts would not permit Pratt to go to trial. If *Penn Central* is the obstacle, the Court should clarify how it applies in this all-too-common circumstance.

The *Williamson County* "final decision" standard is also in need of reexamination and clarification.

The land use regulatory process has become increasingly complex and time-consuming, especially where multi-jurisdictional approvals and permits are required. Pratt was subjected to an exhaustive, time-consuming and expensive land use approval process for 41 residential lots, spanning over nine years. The County approved the project after eight years, and the Coastal Commission reversed the County's approval of the Coastal Development Permit after another ten months, on grounds that preclude ***any*** development of the property that would meet Pratt's reasonable investment-based expectations.

Pratt made a meaningful application (*Williamson County*) for development of a very modest project. If Pratt's case is not ripe now, judicial relief for Pratt,

and all those in similar straits, will become little more than a vain hope. This Court's intervention is required to restore confidence in the efficacy of the judicial process.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO PROVIDE CLEAR GUIDANCE TO LOWER COURTS ON THE APPLICATION OF THE *PENN CENTRAL AD HOC* FACTUAL DETERMINATION TEST.

The first question presented by the Petition is whether the *ad hoc* factual determination required by *Penn Central* allows a California court to hold, as a matter of law, that land use regulations do not effect a regulatory taking if 20% of a parcel can be developed.

Under *Penn Central*, in order to determine whether a regulatory taking has occurred, where there is no physical invasion of property and the landowner is not otherwise deprived of all economically beneficial use, this Court established a three-prong test for engaging in an *ad hoc* factual inquiry that considers (1) the economic impact of regulation on the landowner, (2) the extent to which it has interfered with distinct investment-backed expectations, and (3) the nature of the governmental action. *Penn Central*, 438 U.S. at 124. Here, Pratt never got

to make its case factually, since the trial court denied all relief as a matter of law. The Court of Appeal affirmed, primarily on the ground that the claim was not ripe.

The lack of guidance and more definite standards have allowed local land use permitting jurisdictions to "just say no" to development applications, without providing guidance as to project revisions that would be acceptable and approvable, at the same time attempting to sidestep claims of regulatory taking. As a matter of policy, the landowner should be allowed to present those facts to a court for determination of whether, under *Penn Central,* a regulatory taking has occurred.

Pratt's county-approved development plan called for 100 of the 124 acres (approximately 80%) to be preserved from development, primarily because of the existence of an environmentally sensitive habitat area ("ESHA"). Pratt sought the development of only 41 homes on the remaining 24-acre parcel, a dramatic reduction from the 149 homes originally proposed in 1973. The Court of Appeal held, as a matter of law, that because 20% of the tract remained theoretically available for development, no regulatory taking could occur. The court implied moreover that the Coastal Commission might be amenable to approving a less intense project.

Pratt was therefore denied the right to prove at trial that, in effect, a regulatory taking had occurred: based upon certain of the Coastal Commission's

findings, no project of any type would be approved, as demonstrated below.

As asserted by Pratt, the Coastal Commission concluded, among other things, that the property could not be served by a local water service provider, which had provided a "can and will serve" letter. The Coastal Commission based its conclusion on the stated ground of LCP requirements that preclude water service to the property by off-site water sources because the property was outside the boundaries of an urban service line. As applied to the property, the LCP requirements bar the use of outside water sources, even though there is no available on-site source of water and Pratt was able to secure an off-site source.

Pratt should be allowed to prove at trial that the Coastal Commission will allow no development of the property, thus constituting a taking, because of (1) a regulation precluding the importation of water to the property, where the property could not otherwise generate a water supply, (2) other preclusive findings related to aesthetics and views, (3) the establishment of an ESHA on 80% of the property, and (4) the preservation of the property for an endangered species. Petition at 8-9.[2]

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[2] As this Court stated in *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001), "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible

(Continued on following page)

Pratt was barred from presenting evidence of a taking under *Penn Central*, taking into consideration the economic impact of the regulation on Pratt, the extent to which it had interfered with its reasonable investment-backed expectations, and the nature of the governmental action. Landowners need further guidance from this Court on *Penn Central* review, or they will be faced with takings that are, in fact, total, but for which there is no hope of effective relief in the courts.

II. THE *WILLIAMSON COUNTY* RIPENESS STANDARD MUST BE REFINED TO ACCOUNT FOR THE COMPLEXITY OF THE LAND USE REGULATORY PROCESS.

In this case, the trial court granted judgment as a matter of law to the Coastal Commission, on the ground that Pratt's claim was not ripe for adjudication. The Court of Appeal affirmed. Pursuant to the first prong of the *Williamson County* ripeness test, a regulatory takings claim is not ripe until the governmental entity implementing the regulation has reached a final decision. *Williamson County*, 473 U.S. at 16. The finality requirement has been interpreted as requiring at least one meaningful development proposal. *See Carson Harbor Vill. LTD. v. City of Carson*, 37 F.3d 468, 474 (9th Cir. 1994); *see also*

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uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."

Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1455 n.6 (9th Cir. 1986) (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986)). Under *MacDonald, Sommer & Frates*, rejection of "exceedingly grandiose development plans" does not imply that less ambitious plans will also be denied; therefore, a proposal for a particularly intense use of property does not constitute a meaningful application for *Williamson County* purposes. *MacDonald, Sommer & Frates*, 477 U.S. at 353 nn.8-9. It cannot be reasonably disputed that Pratt submitted a meaningful, not a "grandiose," application.

As stated in the Petition, Pratt submitted to the County a proposal for 41 residential lots, reduced from the 149 residential lots originally proposed in 1973, to be developed on only 20% of its acreage. Thereafter, Pratt worked with the County for more than eight years, finally receiving approval from the County Board of Supervisors. An Environmental Impact Report ("EIR") under the California Environmental Quality Act ("CEQA") was prepared for the project,[3] which, according to the Petition, included

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[3] Cal. Pub. Res. Code §§ 21000-21177 (CEQA); Cal. Code of Regs. tit. 14, §§ 15000-15387 (CEQA Guidelines). As noted in Stephen L. Kostka & Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 1.1 at 2 (2nd ed. 2008):

> CEQA applies to most public agency decisions to carry out, authorize, or approve projects that could have adverse effects on the environment. Unlike most environmental laws, CEQA does not regulate project implementation through substantive regulatory standards

(Continued on following page)

extensive analysis of ten different alternative development proposals.[4] The Coastal Commission, however, not only denied the Coastal Development Permit for the County-approved project, but also impliedly

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> or prohibitions. Instead of prohibiting agencies from approving projects with adverse environmental effects, CEQA requires only that agencies inform themselves about the environmental effects of their proposed actions, carefully consider all relevant information before they act, give the public an opportunity to comment on the environmental issues, and avoid or reduce significant environmental impacts when it is feasible to do so.

For purposes of CEQA and the CEQA Guidelines, the County acted as the "Lead Agency" since it had primary responsibility for carrying out or approving the project. Cal. Code Regs. tit. 14, § 15367. The Coastal Commission acted as a "Responsible Agency" since, although not having primary responsibility for carrying out or approving the project, nevertheless had discretionary approval powers over the project through the Coastal Development Permit process. *Id.* § 15381. Other governmental agencies which may have approval or permitting authority over the project are additionally deemed to be Responsible Agencies for the purposes of CEQA.

[4] It is an essential policy of CEQA that Public Agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures which substantially lessen the significant environmental effects of such projects. Cal. Pub. Res. Code § 21002. The term "feasible" is defined to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." *Id.* § 21061.1. CEQA Guidelines § 15126.6 provides the standards for considering a reasonable range of alternatives to the project, or the location of the project, which would feasibly attain most of the project's basic objectives, but would avoid or lessen significant effects of the project.

rejected all the ten alternatives analyzed in the EIR, stating that it could not modify the project (including altering any of the alternatives), because "revisions that would be necessary . . . are so extensive . . . denial . . . is the only appropriate course. . . . " Pet. at 23-24 (citing AR 3176).

In order to properly analyze whether Pratt submitted a meaningful application (***approved*** by the County after eight years), it is important to consider the context in which development projects are processed in highly regulated states like California. This is not a case where a permitting agency has denied a development application but states that the project could be approved if certain modifications are made.

Rather, in 1990, Pratt submitted an application for a vesting tentative tract map pursuant to provisions of the California Subdivision Map Act.[5] As stated above, an EIR was prepared pursuant to

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[5] Cal. Gov't Code §§ 66410-66499.37. The Subdivision Map Act authorizes the legislative bodies of local agencies, defined as cities, counties, and cities and counties to regulate and control the design and improvement of the subdivision of land, and additionally mandates the performance of certain functions. A "vesting tentative tract map" is a particular type of subdivision map which provides a vested right to develop land subject to the map for a specified period of time after a "Final Map" is filed for record in accordance with only those ordinances, policies and standards of the local agency in effect on the date the application for the vesting tentative tract map is deemed complete. *Id.* §§ 66498.1-66498.9.

CEQA, fully analyzing all of the potential significant adverse environmental impacts of the proposed project, as well as a wide range of feasible alternatives to the project. Under CEQA, as a general rule, the environmentally superior feasible alternative must be selected by the approving body.[6] Thus, after an extensive and exhaustive process of analyzing the project's impacts, and refining the development proposal in collaboration with the County, the County finally approved the project more than eight years after application had been made.

The County, as a part of its land use regulatory permitting process, also approved a Coastal Development Permit for the project, finding the project consistent with the governing LCP, as required by the California Coastal Act.[7] However, the approval of that Coastal Development Permit was appealed to the Coastal Commission, which ultimately denied approval of the EIR-preferred alternative, as well as all of the alternatives included in the EIR. The Commission denied the application on the grounds that project revisions would be so extensive as to render denial the only appropriate remedy. Pet. at 23-24 (citing 19 AR 3176).

Under the Coastal Act, Pratt is not able to simply reapply directly to the Coastal Commission for a

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[6] Cal. Pub. Res. Code §§ 21002, 21081; *see also* Cal. Code Regs. tit. 14, §§ 15091, 15126.6.

[7] Cal. Pub. Res. Code §§ 30000-30900.

Coastal Development Permit; rather, Pratt is required to begin the process anew with the County by filing a new application for the project, including a Coastal Development Permit, processing it in accordance with applicable California land use statutes and regulations, including CEQA and the Subdivision Map Act, as well as with County land use regulations and ordinances, and thereafter again face the possibility of an appeal to the Coastal Commission, and another denial for some or all of the same reasons (e.g., lack of water on-site, views and aesthetics) the application for Coastal Development Permit was originally denied. It would be unfair and unjust to preclude Pratt from presenting and trying his regulatory taking claims.

Nine years and a categorically preclusive "no" is long enough and clear enough for ripeness. No good purpose could be served by sending Pratt back for another nine years and the same answer.

CONCLUSION

Pratt's situation, all too familiar to far too many of amici's members, demands relief. This case is ripe for review, and the Court is asked to grant Pratt's petition.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an amicus curiae or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528

(2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.* 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States* 128 S.Ct. 750 (2008); *Winter v. Nat. Res. Def. Council,* No. 07-1239, 2008 WL 4862464 (U.S. Nov. 12, 2008); *Summers v. Earth Island Inst.,* 490 F.3d 687 (9th Cir. 2007), *cert. granted,* 128 S. Ct. 1118 (2008) (No. 07-463); *Entergy Corp. v. Envtl. Prot. Agency,* 475 F.3d 83 (2d Cir. 2007), *cert. granted,* 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); and *Coeur Ala., Inc. v. S.E. Ala. Cons. Council,* 486 F.3d 683 (9th Cir. 2007), *cert. granted,* 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).

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No. 08-668

In the
Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Six

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been a sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioner Charles A. Pratt Construction Co., Inc.'s, petition for writ of certiorari.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of property rights, having participated as lead or amicus counsel in several takings cases before this Court. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF and its supporters have an interest in the constitutional issues raised in this case. PLF seeks to underscore the need for this Court to address how the lower courts should apply the regulatory takings test

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

articulated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), along with the "final agency decision" prong of the ripeness test articulated in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

SUMMARY OF ARGUMENT

This case represents the latest casualty of a confused takings jurisprudence. Petitioner labored for years finally to obtain county approval for one of ten alternative uses of its property. When the county's approval was appealed by a project opponent, Respondent California Coastal Commission declared, as the court of appeal aptly put it, "the vast bulk" (over 80%) of Petitioner's property to be *undevelopable* environmentally sensitive habitat area. *Charles A. Pratt Constr. Co., Inc. v. California Coastal Comm'n*, 162 Cal. App. 4th 1068 (2008).

The court of appeal nevertheless rejected Petitioner's *Penn Central* claim as unripe and without merit *as a matter of law*. *Id.* at 1080-83. In other words, Petitioner could not try his *Penn Central* claim on evidence presented before a fact-finding judge or jury.

The petition raises several important constitutional issues relating to the Takings Clause of the United States Constitution. Because of the confusion and contradictions that currently plague regulatory takings law, and its impact on countless property owners across the country, this Court should grant the petition for writ of certiorari, for two reasons.

First, review is necessary to resolve important questions concerning the application of the *ad hoc* takings test under *Penn Central*. The California Court

of Appeal's decision in this case deepens the confusion over this test and in effect guts any protection it might otherwise afford against government abuse. This Court's current takings jurisprudence provides no definitive answers to resolve this confusion.

Second, review is necessary to provide guidance on the first prong of the *Williamson County* test: When has a property owner who wants to bring a regulatory takings claim obtained a final administrative decision? The court of appeal's decision—contrary to the language and logic of some of this Court's decisions—all but ensures that takings claimants will be barred from challenging Respondent's appellate land-use decisions.

ARGUMENT

I

REVIEW IS NECESSARY TO END THE PROFOUND CONFUSION THAT *PENN CENTRAL* HAS ENGENDERED

Penn Central is one of several tests used to determine whether a regulation effects a compensable taking. By most accounts, the *Penn Central* test is "the most important takings test"—both as a standard of broad applicability and as a source of substantial dispute. Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 Ariz. J. Int'l & Comp. L. 389, 397 (2007); Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 Envtl. L. 175, 203 (2004); Holly Doremus, *Takings and Transitions*, 19 J. Land Use & Envtl. L. 1 (2003).

If government requires an owner to suffer a permanent physical invasion of property, a taking occurs. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). If a regulation deprives an owner of "all economically beneficial use" of his property, it effects a taking as well. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Both the *Loretto* and *Lucas* tests are relatively straightforward.

What if a regulation fits neither the *Loretto* nor the *Lucas* paradigm? While not requiring an owner to suffer a permanent physical invasion or depriving him of all economically beneficial use of his property, the regulation still may interfere with his property rights. For this scenario, the Court relies upon a third, catch-all test articulated in its 1978 decision in *Penn Central*, which requires a balancing of the following factors to determine whether a taking has occurred:

> (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."

Penn Central, 438 U.S. at 124 (citation omitted).

What do these factors mean, and how are they to be applied? Litigants, their counsel, and the courts—of all ideological persuasions—have been at a loss over the last thirty years fully to understand, let alone articulate, the circumstances under which these factors result in a taking. At one end of the ideological spectrum, noted pro-government litigator and scholar John Echeverria has opined that "*Penn Central* is . . . confusing" and based on "scattered reasoning."

John D. Echeverria, *From a "Darkling Plain" to What? The Regulatory Takings Issue in U.S. Law and Policy*, 30 Vt. L. Rev. 969, 971 (2006). In Echeverria's view, "[t]he so-called 'character' factor is the most confused and confusing feature of regulatory takings doctrine." John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, SK081 ALI-ABA 143 (June 9-10, 2005).

At the other end of the ideological spectrum, pro-property rights scholar Richard Epstein has characterized the *Penn Central* factors as "confused and mischievous." Richard Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 607 (2007). And property rights litigator and scholar Timothy Sandefur similarly has referred to *Penn Central*'s "confusing, multi-factor 'balancing' test." Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 Chap. L. Rev. 1, 32 (2006); *see also* J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After* Palazzolo*, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 Sw. U. L. Rev. 351, 352 (2005) ("[T]he meaning and significance of 'investment-backed expectations' is among the most baffling elements of this confusing and seemingly schizophrenic [regulatory takings] doctrine."); R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Envtl. L. J. 449, 449 (2001) ("Although more than two decades have elapsed since *Penn Central*, neither courts nor commentators have been able to agree on the meaning or applicability of investment-backed expectations in takings law.").

Now, as a result of the court of appeal's decision, there is even confusion about whether a landowner is entitled to present evidence on each of the *Penn Central* factors and prove his claim to a trier of fact. This Court in *Penn Central* said that the three-factor test involved "essentially ad hoc, factual inquiries" about the challenged regulation's nature and impact. *Penn Central*, 438 U.S. at 124. More recently, the Court reiterated the fact-intensive nature of the *Penn Central* inquiry, saying it had designed the test "to allow 'careful examination and weighing of all the relevant circumstances.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. at 636 (O'Connor, J., concurring)).

It makes sense for the *Penn Central* factors to be evaluated on the unique set of facts of each case. The first prong presumably requires proof of the economic value of the subject property, both before and after application of the challenged regulation. *See, e.g.*, *Walcek v. United States*, 44 Fed. Cl. 462, 466 (1999) (describing the intensively disputed factual nature of the inquiry). The second prong requires evidence of the landowner's "distinct investment-backed expectations" (however that term is defined). *Id.* At a minimum, the landowner needs to prove the extent of his investment "in reliance on the regulatory scheme in place at the time of the purchase" and "the extent to which the regulation of [his] property was foreseeable." *Id.* at 466-67 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006, 1013 (1984)). Finally, the third factor—the character of the governmental action—requires a factual investigation into the nature of the regulation's interference with the subject property: Does it produce a physical invasion of the

property? Or, does it simply "adjust[] the benefits and burdens of economic life to promote the common good"? *Penn Central*, 438 U.S. at 124.

However vague the factors might be, it is clear that *all three* factors must be weighed in light of the evidence presented to a trier of fact. Nevertheless, the California Court of Appeal saw it differently. It decided that Petitioner's *Penn Central* claim could not lie *as a matter of law*, because about 20% of its property still could be developed. *Charles A. Pratt Constr. Co., Inc.*, 162 Cal. App. 4th at 1081. The court of appeal denied Petitioner an opportunity to present evidence on the *Penn Central* factors for weighing by the trial court.

The appeals court also relied *exclusively* on the first factor—the economic impact of Respondent's regulation—without weighing (let alone considering) the other two factors. For example, take the third factor concerning the character of the government action. There was no evidence that Respondent's designation of more than 80% of Petitioner's parcel as environmentally sensitive habitat area was *in any way* "adjusting the benefits and burdens of economic life to promote the common good." Instead, Respondent in effect converted Petitioner's designated parcel into a public park—to be enjoyed by the community, entirely at Petitioner's expense—a result that violates this Court's admonition against "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This Court should take the opportunity to end the decades-old confusion surrounding the *Penn Central* test by clarifying that *Penn Central* claimants are to be

given the opportunity to offer evidence to the trier of fact on *all* of the *Penn Central* factors. *See* R. S. Radford, *Instead of a Doctrine:* Penn Central *As the Supreme Court's Retreat from the Rule of Law*, SM040 ALI-ABA 815 (Apr. 12-14, 2007) ("A number of courts, however, have treated the retention of residual value as dispositive in the government's favor, as if the claim had been brought under *Lucas* rather than *Penn Central*. Another pitfall is the tendency of some courts to merge deprivation of beneficial use with the investment-backed expectations inquiry, refusing to consider economic impacts attributable to the loss of uses which, in the court's opinion, the owner could not reasonably have expected to effectuate."); *id.* n.45 (citing *Putnam County Nat'l Bank v. City of New York*, 829 N.Y.S.2d 661, 663 (2007) ("The property owner bears a heavy burden of demonstrating by 'dollars and cents evidence' that under no permissible use would the parcel as a whole be capable of producing a reasonable return upon enforcement of the challenged regulation.")). Further, the Court should remind the lower courts that *Penn Central* sets forth a *balancing test*—i.e., a test that takes into account fully the regulation's injury to the property owner, as well as the government's interests.

II

REVIEW IS NECESSARY TO CLARIFY THE "FINAL AGENCY DECISION" PRONG OF *WILLIAMSON COUNTY*

In *Williamson County*, this Court considered whether a takings claim based on the economic impact of a land-use regulation was ripe. *Williamson County*, 473 U.S. at 174. The Court held that such a claim was

not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 193. The Court also held that a federal takings claim seeking compensation would not be ripe for review in federal court until the plaintiff unsuccessfully sought and was denied just compensation through state compensation procedures. *Id.* at 194, 197. The "final agency decision" prong of the *Williamson County* ripeness test is the prong at issue in this petition: What exactly constitutes a "final" decision?

This Court's subsequent decision in *Palazzolo* provides some clues. There, the Court rejected the notion that the takings claimant must know with absolute certainty all permissible uses for each and every last inch of the property. *Palazzolo*, 533 U.S. at 620. The Court held that a takings claim becomes ripe when the property owner has "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property." *Id.* As the Court explained:

> While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a ***reasonable degree of certainty***, a takings claim is likely to have ripened.

Id. (emphasis added).

Still, despite the Court's clarification, confusion about the "final agency decision" prong of *Williamson County* persists, as evidenced by the California appellate decision in this case.[2] Here, Petitioner was required to jump through the regulatory hoops of two government entities: the County of San Luis Obispo, which has primary land-use regulatory authority, and Respondent California Coastal Commission, which has only appellate jurisdiction over Petitioner's property. After having spent the better part of a decade with the County considering ten different alternative uses for its property, Petitioner finally obtained approval for one of the alternative uses. On appeal, Respondent reviewed *the entire record* of the County proceedings—including all ten of the alternative uses for Petitioner's property—and rejected the development permit: Respondent decided that over 80% of its property was environmentally sensitive habitat area and, therefore, undevelopable. No doubt or dispute exists about the permissible uses for 80% of the land—i.e., that portion of Petitioner's property affected by Respondent's designation: *Nothing at all can be done with that portion of the property. Charles A. Pratt Constr. Co., Inc.*, 162 Cal. App. 4th at 1077.

Nevertheless, the California Court of Appeal held that Respondent had not ripened its claim. Shifting its

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[2] Like *Penn Central*, *Williamson County*'s ripeness test has proved to be an unworkable judicial doctrine, proved by the numerous petitions for writ of certiorari the doctrine has inspired. *See, e.g.*, *Braun v. Ann Arbor Charter Twp.*, ___ S. Ct. ___, 2008 WL 3976943 (Dec. 1, 2008); *Peters v. Village of Clifton, Ill.*, 128 S. Ct. 1472 (2008); *SFW Arecibo, Ltd. v. Rodriguez*, 546 U.S. 1075 (2005).

focus from the 80% of the property that was indisputably undevelopable—and upon which Petitioner based its takings claim—the court of appeal seized on the fact that the remaining 20% *was* developable: "Assuming Pratt's claim is true, that leaves 20 percent of the 121-acre tract, over 24 acres, available for development." *Id* at 1081. In the court's mind, the lack of certainty as to how that 20% could be developed rendered Petitioner's claim unripe for the lack of finality of Respondent's decision.

The appeals courts' ripeness holding—binding on the trial courts of California—conflicts with this Court's decisions. The "final agency decision" prong of *Williamson County* demands reasonably certain finality *on the issue that inflicts an actual, concrete injury*. Here, Respondent's declaration that over 80% of Petitioner's property was environmentally sensitive habitat area and therefore undevelopable was the issue inflicting an actual, concrete injury. With no dispute about how that 80% could be developed—it could not be developed *at all*—the claim was ripe under *Williamson County*.

The implications of the court of appeal's published decision are significant. It endorses form over substance, and risks making long, drawn-out, and ultimately fruitless land-use negotiations the norm (because they are immune from challenge). This is especially the case with respect to Respondent and other government entities like it, which enjoy only *appellate jurisdiction* over development projects. In this case, for example, there is no guarantee that Petitioner ever will be before Respondent with an alternative project, as the court of appeal suggested. Cal. Pub. Res. Code § 30603(a) (Respondent obtains

appellant jurisdiction over local project only if appealed by project opponent). The Court's review is necessary to provide guidance on this issue to all the lower courts, including the California Court of Appeal, and to ensure property owners are not made subject to an unforgiving and rigid rule of ripeness.

CONCLUSION

The Court has an opportunity with this petition to address two of the most vexing doctrines in its takings jurisprudence: *Penn Central* and *Williamson County*. These doctrines come up time and again, but there is little guidance from this Court as to how to apply them. The Court should grant the petition for writ of certiorari.

DATED: December, 2008.

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In The

Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF OF AMICUS CURIAE SAN LEANDRO ROCK CO., INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTEREST OF *AMICUS CURIAE*

The hurdles of restrictive statutory and regulatory law placed in front of property owners have grown higher and higher, to the point where the race can no longer be run for many. Case law has not kept up with these restrictive changes, and the equitable balance between private land use and public interest no longer exists. The story of Petitioners is not isolated. *Amicus curiae* San Leandro Rock Company (hereinafter "San Leandro Rock") is one more example of a property owner lost in the never-ending maze of land use regulation and unable to make economic use of its property as a result.[1]

San Leandro Rock is a small, family-owned business, located in an unincorporated area of the County of Alameda, California, and has been a member of the business community in the San Francisco area for almost a century. The primary business was always the operation of a quarry on the property at issue. The product of their enterprise exists throughout the area. The rock supplied by their quarry

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

This *amicus* brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted blanket consent for the filing of *amicus* briefs in these cases. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

helped to build the roads that we travel on, the buildings that we live and work in.

When the quarry was originally established, the surrounding area was rural and undeveloped. As the area grew, development came to the doorstep of the quarry. A major residential subdivision was developed and homes were built next door to the quarry. This development was authorized by government and welcomed by the new residents who eagerly occupied the new homes. However, the noise, dust and truck traffic common to all quarries became a nuisance to these new neighbors. The neighbors did not care that they had come to the quarry rather than the quarry coming to them. They did not care that they depended on roads and buildings made from the product of this quarry. Their life was disturbed by the quarry and they demanded that it be shut down. The County of Alameda (hereinafter "County") did not care that government had created this situation by allowing development next to the quarry. The County did not care about the history and contribution of the quarry. The County demanded that the quarry be shut down.

San Leandro Rock made a reasonable and necessary request in response – if the quarry was to be shut down, the income from the quarry would need to be replaced through some alternative use of the quarry property. An Alameda County elected official – County Supervisor, Joe Bort – promised the Lee family, owners of San Leandro Rock, that the property could be used for a residential subdivision if only the Lee family would quietly accede to the demands of their new neighbors. And accede they did.

San Leandro Rock ended quarry operations. They invested huge sums of money in "reclaiming" the property, making it look less "quarry-like" and suitable for future residential subdivision. This started to worry the neighbors, who decided that, not only did they not want a quarry; they also did not want more homes. They preferred to leave the quarry as open space, one of the final pieces of land needed to completely ring a nearby lake, Lake Chabot, with open space.

And then came Measure D. Measure D was a County initiative measure created by opponents of development in Eastern Alameda County, distant from San Leandro Rock. Before the measure went to the ballot, its proponents opened the door to all comers – anyone who opposed some development anywhere in Alameda County was welcomed into the fold and invited to add their opposition into Measure D. The neighbors of the San Leandro Rock Company added the quarry property to Measure D, explicitly banning residential subdivision, allowing only limited "agricultural" and "recreational" use, and added a healthy dose of additional restrictions designed to insure that the quarry would never be developed or re-opened as a quarry. The neighbors did not want to entrust county government with these restrictions – the restrictions were absolute and not subject to change by the officials in power. Measure D was passed by the voters in November of 2000, and any hope of developing the quarry property was lost.

San Leandro Rock Company was left with no options. San Leandro Rock could not use the property for a residential subdivision, causing San Leandro Rock to lose its investment in such use (the investment being its agreement to forego quarry revenue together with money actually invested in reclamation for subdivision purposes) and agricultural and recreational use was not economic (it is difficult to graze cattle or grow crops on rock). San Leandro Rock filed a lawsuit on November 5, 2002, alleging that the application of Measure D to the quarry property resulted in a taking without compensation. After service, the County immediately filed a series of motions to summarily end the case, primarily based on the argument that the Complaint fails to state a claim in that the case was not ripe for adjudication. The ripeness argument contended that a case could not be brought against the County until San Leandro Rock had submitted a development application to the County and the County had denied the application.

The Trial Court ruled in favor of San Leandro Rock, ultimately holding that "the facts alleged support the conclusion that no land use agency [in the County] has discretion to permit any economically viable uses [of the quarry property], and that all permissible uses [of the quarry property] are known to a reasonable degree of certainty. For that reason, the Court cannot conclude that Plaintiff's as-applied takings claim is not ripe for adjudication."

The County appealed this decision, contending that all takings claims must be preceded by a development application that has been acted upon. In

October of 2005, the California Court of Appeal ruled in favor of the County and directed the Trial Court to vacate its holding. The Court of Appeal concluded that the matter was not ripe because the County had not had "the opportunity to exercise its full discretion in considering [the landowner's] plans for the property in light of the measure."

San Leandro Rock petitioned the California Supreme Court for review. The Petition was denied.

In accordance with the Court of Appeal's decision, San Leandro Rock began an attempt to work with the County to discuss possible uses of the subject property. On June 27, 2006, after proceedings in the first lawsuit were final, San Leandro Rock sent a letter to the County. San Leandro Rock requested that the County work with San Leandro Rock to help define the application of Measure D to the subject property. San Leandro Rock noted that a prompt response from the County would be greatly appreciated, as the lack of economically viable use of the subject property was becoming a serious strain on San Leandro Rock. The County responded on August 16, 2006 with a letter that simply stated, "County Counsel and the Planning Department are preparing a detailed response to your questions regarding restrictions on and possible uses of the property. However, I would like you to be aware that due to vacation schedules in both offices, we are unable to prepare a more comprehensive response at this time. You should expect a response within approximately one month."

On December 1, 2006, five months after San Leandro Rock's first letter, and two and one-half months after the date of the County's promised response, San Leandro Rock sent a final letter to the County, reminding the County of its outstanding commitment to work with San Leandro Rock. The letter again stressed the financial difficulties being faced by San Leandro Rock. Another five months passed with no word from the County. On May 3, 2007, almost one year after first writing to the County, San Leandro Rock filed a second lawsuit. The County had proven to be uncooperative and had certainly not provided any input to indicate that economically viable uses of the subject property did somehow exist.

On June 14, 2007, after service of the new lawsuit, County Counsel sent a letter to San Leandro Rock stating that a response to San Leandro Rock's first letter would be forthcoming. In addition, County Counsel stated that a meeting would be arranged between San Leandro Rock and the County Planning Director and County Community Development Agency Director. The stated purpose of the meeting would be to discuss any questions that San Leandro Rock had about submitting a development application for the subject property.

On June 18, 2007, the County finally responded to San Leandro Rock's letter of June 27, **2006**. The letter confirmed that residential use was absolutely limited by Measure D to one primary unit and one secondary/accessory unit per parcel (a subdivision

was not permissible). The letter confirmed that a quarry could **not** be reopened on the subject property. The letter confirmed that the only other known reuse of quarries in the area had been for development of residential subdivisions.

On August 29, 2007, the County met with San Leandro Rock. The County confirmed that, if San Leandro Rock were to apply for a more than one primary and one secondary/accessory residential unit per parcel, extensive technical reports would be required with the application for the application to be accepted by the County for consideration. The County confirmed that the costs to San Leandro Rock for developing the required technical reports would be significant. The County confirmed that such an application for a multiple unit residential subdivision would then be denied by the County due to Measure D.

The second lawsuit remained ongoing while these discussions between San Leandro Rock and the County were occurring. After the conclusion of these discussions, the County filed a motion to dismiss (a demurrer) the case. In March of 2008, the motion was granted. The court stated that San Leandro Rock had to file a development application.

So, seven years after passage of Measure D, and after more than five years of litigation and negotiation, San Leandro Rock remains stuck. It knows that the property cannot be developed, but has been directed by the Court to invest a large sum of money

– money that San Leandro Rock cannot afford to spend – in a pointless, time-consuming application process with a known outcome.

II. SUMMARY OF ARGUMENT

Land use regulation and associated regulatory takings law has been evolving over the past ninety years, with the most significant changes occurring in the last thirty years. Land use regulation was originally intended solely to protect the integrity of neighborhoods. Over time, the purpose behind land use regulation has shifted and it is now overwhelmingly directed at the protection of wetlands, endangered species, air and water quality and so on. This evolutionary march began in New York in 1916 with the adoption of the county's first significant zoning ordinance. The goal of this ordinance was to prevent the spread of tenements into more affluent neighborhoods. Fulton, Guide to California Planning (1991), p. 7.

This was followed six years later with the first regulatory takings case to reach the United States Supreme Court – *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393 [67 L. Ed. 322, 43 S. Ct. 158] (hereinafter "*Pennsylvania Coal*"). In *Pennsylvania Coal*, the United States Supreme Court held that in some cases government regulation could go too far and constitute a taking of private property without compensation. The *Pennsylvania Coal* court provided a foretelling warning: "We are in danger of forgetting

that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal, supra,* at 416.

However, over time, courts have been reluctant to find that regulation amounts to taking. In large part the courts have indicated a belief that no taking can occur if a property owner is allowed some economic use of property. Courts have also been reluctant to intervene in the regulatory process. Courts have required property owners to work with government to find some economically viable use for a property within the existing regulatory structure prior to filing a lawsuit for inverse condemnation. This was reflective of the fact that within these regulatory structures, the executive branch of government had substantial discretion to remedy inequities caused by the regulation when applied to a particular property. For example, if a zoning ordinance limited development on a parcel to commercial development and a property owner could satisfy the government that commercial development was not economically viable but residential development would be, government had the power to exercise discretion and apply a variance of its ordinance to allow residential development on the particular parcel at issue. Courts wanted to allow the executive branch of government to have an opportunity to exercise such discretion before intervening. For this reason, courts created a substantial body of law that developed a ripeness

doctrine unique to regulatory takings cases. This doctrine was unique in that it did not necessarily have any defined boundaries – a property owner might be required to submit an undefined number of development applications and receive several rejections before a court would be inclined to determine whether a regulatory taking had occurred. The courts viewed this multiple application process as an ongoing negotiation between the property owner and the government that needed to occur to help define the actual scope of a regulation as applied to a particular property. The necessity for this to occur prior to court intervention was entirely the result of the tremendous discretion placed into the hands of the executive branch of government in most land use regulations.

However, while courts were indicating reluctance to intervene in governmental regulation, the restrictive scope and nature of regulation began expanding dramatically. In the 1970s, new regulatory laws were enacted and directed at the protection of the environment – the federal Clean Air Act, Clean Water Act, Coastal Zone Management Act, National Environmental Policy Act, etc. These laws resulted in significant environmental benefits, but also placed heavy burdens on property owners. Many of these laws were very strict in nature and began to limit the discretion of the executive branch of government to address the concerns of the property owners.

This limitation on discretion resulted in modifications to the ripeness doctrine in regulatory takings cases. In some cases, multiple applications were not

required prior to court intervention – a single application could be sufficient.

Perhaps the most significant change in regulatory law in California began to be seen in the early 1980s. Groups interested in ensuring the limitation of property development began placing initiatives on the ballot that were highly restrictive in nature. These initiatives created laws that were very specific in defining land use and also precluded the application of discretion by the executive branch of government. In fact, these initiatives went one step further and also removed the discretion of the legislative branch of government to change the law, providing that the law could only be modified by subsequent initiative action by the voters. Fulton, *supra*, at p. 145.

It is this most recent development that is at the heart of the case of San Leandro Rock Measure D, the County initiative ordinance discussed above, is part of this new breed of restrictive land use ordinances that remove government from the equation. It was created to stop development on vast acreages in the Livermore area, some twenty five miles away from the quarry property. The quarry property was then targeted and added to the initiative after its creation.

Measure D may be one of the most restrictive land use regulations seen to date, with only the possibility of an absolute prohibition on any development of any type being more restrictive. It was designed to remove discretion from county government

– no variances could be granted. The law created by Measure D could only be changed by a subsequent initiative, and Measure D blatantly transferred the traditional role of the executive branch – the exercise of discretion to avoid a regulatory taking – into the hands of the judiciary. Section 1 of Measure D stated that " **. . . [t]he ordinance is designed to remove the County government from urban development outside the Growth Boundary**" (emphasis added). Additionally, section 3 of Measure D stated that "[n]otwithstanding their literal terms, the provisions of this ordinance do not apply to the extent, but only to the extent, that **courts** determine that if they were applied they would deprive any person of constitutional or statutory rights or privileges, or otherwise would be inconsistent with the United States or State constitutions or law." In other words, the explicit purpose of this ordinance was to remove the very discretion that is the fundamental reason for the ripeness doctrine that courts have traditionally applied to regulatory takings cases.

The California Court of Appeal decision involving San Leandro Rock reflects the problems with current ripeness doctrine which requires that at least one development application must be filed in all cases prior to the filing of any action for inverse condemnation. *County of Alameda v. Superior Court* (2005), 133 Cal.App.4th 558. In doing so, the Court of Appeal relied principally on three cases, one federal (United States Supreme Court) and two state (both First District Court of Appeal). The federal case is

Palazzolo v. Rhode Island (2001), 533 U.S. 606 [150 L. Ed. 2d 592, 121 S. Ct. 2448] (hereinafter "*Palazzolo*"). The two state cases are *Milagra Ridge Partners, LTD v. City of Pacifica* (1998), 62 Cal.App.4th 108 (hereinafter "*Milagra*") and *Shea Homes Limited Partnership v. County of Alameda* (2003), 110 Cal.App.4th 1246 (hereinafter "*Shea*").[2] The Court of Appeal held that these cases together stand for the proposition that at least one development application must be submitted by a property owner prior to the filing of regulatory takings claim in court. The Court of Appeal noted that it felt particularly bound by the *Shea* decision, which actually dealt with Measure D and found a purported as-applied regulatory takings claim to be unripe due to the failure of the property

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[2] While the Court of Appeal did rely principally on *Palazzolo*, *Milagra* and *Shea* in reaching its conclusion, it did refer to a number of other state and federal cases in its decision, including *Calprop Corp. v. City of San Diego* (2000), 77 Cal.4th 582; *Hensler v. City of Glendale* (1994), 8 Cal.4th 1; *Long Beach Equities, Inc. v. County of Ventura* (1991), 231 Cal.App.3d 1016; *Toigo v. Town of Ross* (1998), 7 Cal.App.4th 309; *Dodd v. Hood River County* (9th Cir. 1995), 59 F.2d 852; *MacDonald, Sommer & Frates v. Yolo County* (1986), 477 U.S. 340 [91 L. Ed. 2d 285, 106 S. Ct. 2561]; *Williamson Planning Comm'n v. Hamilton Bank* (1985), 473 U.S. 172 [87 L. Ed. 2d 126, 105 S. Ct. 3108]; and *Yee v. Escondido* (1992), 503 U.S. 519 [118 L. Ed. 2d 153, 112 S. Ct. 1522]. However, these cases only add to the confusion. They are simply extensions of *Milagra* as they all pre-date *Palazzolo* and all involve land use regulations that allowed for the exercise of discretion by government. None of these cases considered ripeness doctrine in light of the evolution of land use regulation.

owner to file a development application after the adoption of Measure D.

The case of San Leandro Rock supports the proposition that a development application is not an absolute prerequisite to the filing of an action for inverse condemnation. It demonstrates the need to advance case law to match advances in statutory law and to secure uniformity of decision and to settle an important question of law. While the Court of Appeal found *Palazzolo*, *Milagra* and *Shea* to be consistent, in fact they are not. As will be discussed in more detail below, *Palazzolo* was the first case to truly consider ripeness doctrine in light of the current state of land use regulation. *Palazzolo* noted that land use regulation had historically allowed a governmental agency to exercise discretion to avoid takings but that current land use regulation had become much more strict and the ability of a governmental agency to exercise discretion was becoming more limited. *Palazzolo* held that an application is not required as a prerequisite to the filing of a regulatory takings claim if there is **reasonable** degree of certainty as to the land's permitted use. *Palazzolo* at 533 U.S. 620.

Milagra, in turn, did not consider the evolution of land use regulation. *Milagra* focused on the ability of a governmental agency to exercise discretion and found that development applications would be required prior to the filing of a lawsuit to allow a governmental agency the opportunity to exercise discretion and avoid a taking.

Most problematic of all is the holding in the *Shea* case. *Shea* actually involved Measure D. Property owners in the area primarily impacted by Measure D (Livermore) had filed a number of legal challenges to Measure D. One property owner raised a very late as-applied takings claim. This claim was raised in oral argument, was not briefed and was not the principal legal challenge. However, since it was raised, the Court of Appeal was forced to respond to it, and issued a decision indicating that any as-applied regulatory takings claim under Measure D would have to be preceded by a development application. The *Shea* decision is directly in conflict with the holding in *Palazzolo*. The *Shea* decision is a classic example of bad facts making bad law.

The decision of the Court of Appeal in the San Leandro Rock case is similarly at odds with *Palazzolo*. The Court of Appeal is saying that one application is a prerequisite to any regulatory takings claims. Specifically, the Court of Appeal found that, since Measure D did allow for "agricultural" and "recreational" use of the quarry property, the County should be allowed to interpret the term "agricultural use" and that San Leandro Rock was not in a position to conclude how the County might interpret these terms or to understand whether such uses were economically viable on the quarry property. However, with *Palazzolo's* reference to reasonable certainty, it is clear that San Leandro Rock should be allowed to determine the likely interpretation of these terms, as

they are common usage and not technical in nature. If, as an issue of fact, San Leandro Rock has made a reasonable conclusion about the meaning of such a term and has found such uses to be uneconomic given the nature of its property, then, under *Palazzolo*, San Leandro Rock would be allowed to file its takings claim based on this conclusion without submitting an unnecessary development application. The Court of Appeal did not address the fact that San Leandro Rock's claims were based in part on the loss of its "reasonable investment-backed expectation."

III. ARGUMENT

A. The *Palazzolo* Case Clearly Established That a Development Application Is Not a Prerequisite to All Regulatory Takings Cases.

The United States Supreme Court decision in *Palazzolo* is a recognition of the trend towards more restrictive land use regulation. In some instances, the discretion of a regulatory authority may be proscribed to the extent that the outcome of a development application can be known with reasonable certainty prior to the submission of a development application. If the regulatory authority lacks the ability to rectify the application of a regulation in cases where the regulation does cause a hardship to the property owner that rises to the level of a taking, there is little point in requiring the submission of an application

that will only result in additional costs to the property owner and delay compensation in cases where a regulatory taking has in fact occurred. *Palazzolo* involved the regulation of a 20 acre coastal parcel of land in Rhode Island. The parcel was purchased by the plaintiff, Anthony Palazzolo in 1959 (it was originally purchased by a corporation owned by Mr. Palazzolo and subsequently transferred to his direct ownership). The parcel consisted of 18 acres of wetland and 2 acres of upland. In 1971, development of the parcel became subject to regulation by the Rhode Island Coastal Resources Management Council (hereinafter "Council"). In 1983, Mr. Palazzolo submitted an application to the Council to fill the entire parcel. This application was rejected by the Council due to the extensive impacts to wetlands. In 1985, Mr. Palazzolo submitted a new application to fill 11 acres of the parcel. The Council rejected this application, again due to the extensive wetland impacts. Mr. Palazzolo subsequently filed suit in inverse condemnation. *Palazzolo* at 533 U.S. 613-615.

The Rhode Island Supreme Court held that Mr. Palazzolo's claim was not ripe as he had not explored lesser development options, including reducing the amount of wetland impacts and/or limiting development to the 2 acre upland area which would clearly avoid the wetland impacts that were of concern to the Council. *Palazzolo* at 533 U.S. 616-618. The United States Supreme Court disagreed, noting that it was

clear that the Council lacked discretion to approve **any** fill of wetlands, and stated that the:

> final decision requirement "**responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer**." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, **once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened**. *Palazzolo* at 533 U.S. 620 (emphasis added).

In *Palazzolo*, the Supreme Court recognized the unfairness of a ripeness standard that had a blind requirement for the submission of an application and a final agency determination prior to the filing of an action in inverse condemnation. Such a ripeness standard allowed a regulator to avoid challenge by keeping a property owner stuck in a pointless and endless approval process. *Palazzolo* substantially modified the ripeness doctrine by holding that a property owner is not obligated to file a development application and obtain a final decision on the application if the result of the application process is reasonably clear at the outset. This was perhaps most bluntly stated in the following quote:

> Our ripeness jurisprudence imposes obligations on landowners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348. **Ripeness doctrine does not require a landowner to submit applications for their own sake**. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use (emphasis added). *Palazzolo* at 533 U.S. 622.

The Supreme Court did not determine that Mr. Palazzolo's case was ripe because he had submitted some applications; rather, the Supreme Court determined that the case was ripe because the outcome of any application by Mr. Palazzolo was reasonably clear. If a regulatory scheme is so defined that it makes the outcome of a development application known prior to the application, an application is not required for the sake of process. One application is no longer an absolute prerequisite to a takings claim.

B. The *Milagra* Case Involved a Discretionary Decision

Milagra pre-dates *Palazzolo*. The plaintiff in *Milagra* purchased a forty-five acre parcel in 1979 or 1980. In 1985, the plaintiff submitted an application to the City of Pacifica for a 144 unit townhouse development. This application was denied. In 1994, the plaintiff submitted an application for a 64 unit single

family residential development to the City of Pacifica. The City approved development of 63 of the 64 requested units. However, due to some opposition to the development, the City submitted the matter to the voters for approval of the development. The voters rejected the development. The plaintiff then filed suit in inverse condemnation. *Milagra,* 62 Cal.App.4th at 112-115. The Court of Appeal held that the case was not ripe as the plaintiff had not submitted an application for development that was permissible under the zoning in effect at the time. The Court noted that current zoning would allow for some commercial and residential development, and in the event the allowable development was not economically viable, **the plaintiff could ask the City to exercise its discretion to grant a minor variance to allow the approval of development that would be economically viable**. *Milagra,* 62 Cal.App.4th at 119.

Milagra therefore involved a regulatory scheme that allowed the agency to exercise discretion, and this was critical to the Court's determination that the case was not ripe. The regulation at issue in *Milagra* is clearly distinguishable from the stricter regulations that are becoming more prevalent. It is notable that the *Palazzolo* court rejected a *Milagra* analysis, stating:

> [This] . . . case is quite unlike those upon which respondents [Rhode Island] place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt

whether a more modest submission or an application for a variance would be accepted. *Palazzolo* at 533 U.S. 620.

C. The *Shea* Case Was Different Procedurally and Factually From *Palazzolo* and *Milagra*

Shea does post-date *Palazzolo*. *Shea* involved two consolidated cases – one filed by Shea Homes and one filed by Trafalgar, Inc. (hereinafter "Trafalgar"). Both Shea Homes and Trafalgar were trying to develop large tracts of agricultural land in Livermore in eastern Alameda County prior to the passage of Measure D. When Measure D was passed, both Shea Homes and Trafalgar filed lawsuits against the County challenging Measure D. However, these legal challenges were all facial challenges to Measure D. Shea Homes and Trafalgar both alleged that Measure D violated the state constitutional requirement that all initiatives have a "single subject" and that Measure D violated California housing law. The Trial Court (the Alameda County Superior Court) granted judgment on the pleadings in favor of the County. *Shea*, 110 Cal.App.4th at 1253-1254. The Court of Appeal affirmed this ruling. *Shea*, 110 Cal.App.4th at 1259, 1266.

Trafalgar did also include a takings claim in its lawsuit – however, this was a facial takings claim. At the hearing on the County's Motion for Judgment on the Pleadings, Trafalgar apparently realized its error and requested, during the hearing, leave to amend to

allege an as-applied takings claim. However, Trafalgar did not present any detailed facts to support its request, and the Trial Court ruled that Trafalgar had not presented any evidence to indicate that it had a ripe as-applied takings claim. The Trial Court also entered judgment on the pleadings in favor of the County on this claim. On appeal, Trafalgar continued to only touch on the issue of an as-applied takings claim under Measure D. The issue was never meaningfully briefed. The limited briefing of the issue unfortunately mischaracterized *Palazzolo*, and the Court of Appeal affirmed the Trial Court's ruling, holding that Trafalgar had not presented any facts to indicate that it could allege denial of an application submitted after the passage of Measure D and therefore no ripe as-applied takings claim. *Shea*, 110 Cal.App.4th at 1266-1269. The end result was a decision that cited *Palazzolo* as precedent for the decision while in fact the *Shea* decision was in direct conflict with *Palazzolo*.

IV. CONCLUSION

It is clear that case law governing the ripeness doctrine is in conflict, certainly less than clear, and not consistent with the advance of statutory land use law. If the actual status of law is that property owners must submit expensive and quixotic development applications when faced with the Measure Ds of the world, then we have not learned from history, and eighty-three years after the *Pennsylvania Coal* decision, we remain "in danger of forgetting that a strong

public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." It is now thirty years after the advent of stricter land use regulation and twenty years after the development of initiatives that removed the ability of the government to exercise discretion. It is time to develop a new ripeness doctrine that addresses the evolution of land use regulation in a manner that responds to the fundamental concern of the *Pennsylvania Coal* decision.

San Leandro Rock supports the Petition for a Writ of Certiorari filed by Charles A. Pratt Construction Co., Inc., and respectfully requests that the Petition be granted. Clear guidance on the issue of ripeness is needed.

Dated: December 22, 2008

Respectfully submitted,

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No. 08-668

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In The
Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate Dist., Div. 6

BRIEF FOR WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

   Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg. Plan. Commn., v. Hamilton Bank*, 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

   Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Western Manufactured Housing Communities Association (WMA) is a nonprofit organization created in 1945 for the exclusive purpose of promoting and protecting the interests of owners, operators and developers of manufactured home communities in California.[1] The vast majority of WMA's member communities are family owned and operated businesses dedicated to providing quality housing to Californians. WMA's activities include representation before the California State Legislature, regulatory agencies and local elected officials. Through the Committee to Save Property Rights, WMA represents the industry in the courts by participating as *amicus curiae* in selected cases. *See*, *e.g.*, *Manufactured Home Communities, Inc. v. County of San Luis Obispo*, 84 Cal. Rptr. 3d 367, 370 (Cal. Ct. App. 2008) ("The Constitution protects everyone, the poor, the wealthy, the weak, the powerful, the guilty and the innocent. . . . Here we add to our list, mobile-home park owners."); *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001) (substantive due process claim).

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[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than *amicus* made a monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The first Question presents "the next big thing" in regulatory takings law – how the *ad hoc Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) standard is being applied by the lower courts.[2]

More than thirty years ago, this Court established a three-factor framework for analyzing most regulatory takings claims, and this standard has been recently reaffirmed as the "default" test. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005). *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor J., concurring) ("[O]ur polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances.")). These circumstances include consideration of "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action." *Penn Central*, 438 U.S. at 124 (cited in *Lingle*, 544 U.S. at 538-39).

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[2] *See* John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 172 (2005) ("The next 'big thing'– perhaps the last big thing – in regulatory takings law will be resolving the meaning of the *Penn Central* factors.").

Because this framework eschews any "set formula" and relies instead on "essentially ad hoc, factual inquiries," it is, by its very nature, incapable of being subject to the rigid "20 percent is enough value" *per se* rule established by the California court. The decision below ignored the requirement of a "weighing of *all* the relevant circumstances," and established a bright-line rule focused solely on economic impact: when the government's denial of a development proposal leaves a property owner with no more than 20 percent (or as little as 1120 square feet) of her land available for development, the remaining two *Penn Central* factors become irrelevant. This arbitrary rule is apparently based on nothing more than caprice, since the court below offered no analysis or rationale in support. Lacking this Court's clarification, the default regulatory takings test has become a standardless exercise in judicial intuition, hidden behind a gloss of objectivity.

The second Question also presents a critical issue. The ripeness requirement of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) has two parts. First, there must have been an indication by the government regarding what uses it will or will not allow. The "final decision" rule requires "the government entity charged with implementing the regulations [to have] reached a final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186. This requirement was formulated to avoid having courts

decide *Penn Central* claims that a regulation has sufficiently impacted an owner's use of her property, when it remains uncertain what uses the government may allow. *See id.* at 191 (The *Penn Central* "factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."). Second, *Williamson County* requires a property owner to seek – and be denied – compensation in state court, before coming to federal court and suffering dismissal under preclusion and full faith and credit principles. These two rules have proven to be tools for gamesmanship and illogical procedural traps instead of a way to insure regulatory takings claims are ready for judicial review.

The final decision rule cannot be applied to bar the courthouse door based solely on the government's assertion there may be *some* alternative under which development would be allowed. Denial of one viable application is enough.

This Court should review the decision of the California Court of Appeal.

ARGUMENT

I. SINCE THE *PENN CENTRAL* TEST IS HERE TO STAY, THE COURT SHOULD CLARIFY IT IS NOT SUBJECT TO BRIGHT-LINE RULES

According to the "storied but cryptic formulation" in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), while property may be regulated to a certain extent, "'if regulation goes too far it will be recognized as a taking.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Mahon*, 260 U.S. at 415). In other words, government's power to enact regulations affecting private property operates on a continuum, and when it crosses an equitable boundary determined in most cases by reference to a multitude of case-specific facts, the label attached to the exercise of power becomes irrelevant, and what matters is the impact of the regulation on the owner. *See Mahon*, 260 U.S. at 413 (Kohler Act enacted pursuant to state's police power went "too far"); *Andrus v. Allard*, 444 U.S. 51, 64 & n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "there is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such

formal proceedings."); *Lingle*, 544 U.S. at 537 (This Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such 'regulatory takings' may be compensable under the Fifth Amendment.").[3] If a regulation has the same effect as a seizure by an

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[3] As this Court recognized in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a government action is not immune from judicial review simply because it is labeled an "economic" or "police power" regulation if it impacts property disproportionately:

> But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. . . . We see no reasons why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Id. at 392 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Air Pollution Variance Bd. of Colorado v. W. Alfalfa Corp.*, 416 U.S. 861 (1974); *New York v. Burger*, 482 U.S. 691 (1987); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)). Similar analysis is applied to other limitations on government power that protect fundamental rights, and these limitations do not depend on the power the government claims to be exercising. For example, a police power regulation is reviewed with strict scrutiny if it is alleged to impact free speech rights, even if it does not appear to be affirmative government censorship. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (invalidating law restricting placement of signs within 500 feet of embassy because it was not narrowly tailored).

affirmative exercise of eminent domain, the government has the choice to either back off the regulation, or, if it desires to continue to regulate, pay just compensation. *First English*, 482 U.S. at 316 (Fifth Amendment requires both invalidation and just compensation remedies); *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (imposition of a navigational servitude pursuant to the federal commerce power would be an invalid taking). "The rub, of course, has been – and remains – how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538 (citing *Andrus*, 444 U.S. at 65; *Mahon*, 260 U.S. at 413).

In some cases, it is easy. This Court has established two categories of regulatory actions that generally will be deemed *per se* takings. First, "where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (law requiring property owners to allow installation of a small cable box on buildings was a taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (agency required landowner to dedicate public easement as a condition of development approvals). Second, a taking occurs when a regulation completely deprives an owner of "'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)) (emphasis omitted).

In the remainder of cases, the rules are not as easily applied. Regulatory takings challenges outside of the two "relatively narrow" classes of physical invasions and economic wipeouts are analyzed by the three-part *Penn Central* standard. In that case, this Court "acknowledged that it had hitherto been unable to develop any set formula for evaluating regulatory takings claims, but identified several factors that have particular significance." *Penn Central*, 438 U.S. at 124. Those factors include: (1) the "economic impact" of the government action or regulation; (2) how this action "interferes with distinct investment-backed expectations;" and (3) the "character" of the regulation or government action. *Id.* (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)). The *Penn Central* inquiry is inherently fact-based, and "depends largely upon the particular circumstances [in that] case." *Id.* These considerations, "though each has given rise to vexing subsidiary questions – have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules." *Lingle*, 544 U.S. at 539 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18, 632-34 (2001) (O'Connor, J., concurring)). Questions of economic viability and diminution of use and value are factual inquiries. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [a] question is for the jury.").

The "20 percent is enough value" rule established by the court below transforms the economic impact factor into a legal issue and the only relevant consideration, despite this Court's recent caution that no *Penn Central* factor is entitled to conclusive weight. *Lingle*, 544 U.S. at 539. The California court provided no rationale for this bright-line rule:

> Pratt claims that 80 percent of his tract is designated ESHA [Environmentally Sensitive Habitat Area] and that no development is possible in an ESHA. Assuming Pratt's claim is true, that leaves 20 percent of the 121-acre tract, over 24 acres, available for development.

Charles A. Pratt Constr. Co., Inc. v. California Coastal Comm'n, 76 Cal. Rptr. 3d 466, 475 (Cal. Ct. App. 2008).

Yet, the decision below – while inexplicable – is not surprising, given the difficulty the lower courts, property owners, and governments have understanding the *Penn Central* theory and applying the economic impact factor. For example, the court in *Noghrey v. Town of Brookhaven*, 852 N.Y.S. 2d 220 (N.Y. App. Div. 2008) reversed a jury's federal regulatory takings verdict. The plaintiff purchased parcels zoned for shopping plazas with the intention of building one. The town adopted a moratorium to study the zoning on the parcels and eventually rezoned them for residential uses. The property owner brought regulatory takings claims under the Fifth Amendment and state law. The jury determined the property

owner had not established a total regulatory taking pursuant to *Lucas* but found that the owner had established a partial regulatory taking under the *Penn Central* test. *Noghrey*, 852 N.Y.S. 2d at 221. The trial court instructed the jury on the three factors:

> With respect to the first [*Penn Central*] factor; that is, the economic impact of the regulation, [the property owner] claims that the values of his properties were reduced substantially. You may consider the values of the properties immediately before and immediately after the rezoning, and whether or not this reduction in value was a substantial reduction relative to the value before the properties were rezoned. [The property owner] must prove by a preponderance of the evidence that the rezoning deprived him of any use permitted by the residential zoning classification and this resulted in . . . a near total or substantial decrease or significant reduction in value.

Id. (emphasis omitted). The appellate court held this jury instruction did not properly convey the *Penn Central* standard regarding economic impact, even though it did. Citing *Lucas* for the proposition that a 95 percent diminution of value would not result in a *per se* taking because it was "one step short of complete," the court of appeals conflated the *per se Lucas* rule (which requires an economic wipeout) with *Penn Central*'s economic impact factor which does not contain any "set formula" for when a diminution of value will

result in a taking, when considered along with the other two factors. *Id.*

Thus, while a "substantial" or "significant" diminution of value will not necessarily result in a *Lucas per se* taking, this only means a trial is necessary to determine whether – in light of the other *Penn Central* factors – a less-than-total reduction in value is a taking because the "[g]overnment [is] forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Instead, like the California court in the case at bar, *Noghrey* established a bright-line rule that even "substantial" and "significant" economic impacts are insufficient as a matter of law, regardless of the property owner's distinct investment-backed expectations or the character of the government action. *See Noghrey*, 852 N.Y.S. 2d at 222 ("The terms 'substantial' and 'significant' were insufficient to convey the extent of diminution necessary to support a taking."). The court held that for even a partial *Penn Central* taking, the economic impact must be "one step short of complete," and that the proper test is whether the regulation left only a "bare residue" of value. *See id.* at 222-23 (On remand, the court "should instruct the jury that the proper inquiry is whether the regulation left only a 'bare residue' of value, or use similar language which would properly convey to the jury the high threshold of loss necessary to support a partial regulatory taking.") (citing *de St. Aubin v.*

Flacke, 505 N.Y.S. 2d 859 (N.Y. 1986); *Brace v. United States*, 72 Fed. Cl. 337 (2006); *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983); *Friedenburg v. New York State Dep't of Envtl. Conservation*, 767 N.Y.S. 2d 451 (N.Y. App. Div. 2003)).[4]

The lower courts' confusion is not limited to cases where liability is denied. In *Mann v. Georgia Dep't of Corr.*, 653 S.E.2d 740 (Ga. 2007), the Georgia Supreme Court invalidated under the Takings Clause a statute which prohibited registered sex offenders from residing within 1,000 feet of a child care facility. Mann, an offender, was living legally in a home he owned when a child care facility relocated to within 1,000 feet of him. The Department of Corrections ordered Mann to leave upon pain of arrest. The court noted the effect of the Georgia statute was not simply to interfere with Mann's property rights, but to dispossess him of his home. The court held "the effect of [the statute] is to mandate appellant's immediate physical removal from his Hibiscus Court residence.

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[4] *See also Frall Developers, Inc. v. Bd. of County Comm'rs of Frederick County*, 2008 U.S. Dist. LEXIS 78912, at *45-*46 (D. Md. Sep. 30, 2008) (only analyzing case under the *per se* rules, and not applying *Penn Central* factors, concluding no taking occurred because plaintiff was not deprived of all value); *Sands North, Inc. v. City of Anchorage*, 537 F. Supp. 2d 1032, 1041 (D. Alaska 2007) (dismissing case because "Plaintiff's bare assertion that 'the regulation interferes with Plaintiff's investment-based expectations' is inadequate to survive a motion for judgment on the pleadings").

It is 'functionally equivalent to the classic taking in which government directly . . . ousts the owner from his domain.'" *Id.* at 744 (citing *Lingle*, 544 U.S. at 539). Despite the physical invasion – the statute in effect invited *anyone but Mann* to occupy his house, and had the effect of evicting him – the court applied the *ad hoc Penn Central* test instead of the *Loretto per se* standard because of the court's misunderstanding that *Penn Central* governed all other takings not within the *Lucas* wipeout rule. *Mann*, 653 S.E.2d at 742-44.

Penn Central's factors have also been the subject of academic criticism and a call for clarification:

> If the *Penn Central* test is to serve as more than legal decoration for judicial rulings based on intuition, it is imperative to clarify the meaning of *Penn Central*.

John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 174-75 (2005). "Intuition," not the rule of law, appears to be what guided the court below to come up with its arbitrary 20 percent rule. Since *Penn Central* indeed appears to be "here to stay," *id.*, the petition in the case at bar presents the opportunity to clarify that "set formulas" such as those imposed by the California court in this case and the New York court in *Noghrey*, are not permitted under *Penn Central*.

II. DENIAL OF A DETAILED DEVELOPMENT PROPOSAL IS FINAL ENOUGH

Can more be said about the ripeness rules established by *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) that has not been already said? In *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005) four Justices of this Court wrote separately to note their belief the exhaustion requirement of *Williamson County* should be revisited:

> Finally, *Williamson County*'s state-litigation rule has created some real anomalies, justifying our revisiting the issue. . . . I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.

Id. at 351 (Rehnquist, C.J., concurring). This term, two petitions have called for the case to be reconsidered. *See* Petition For a Writ of Certiorari, *Braun v. Ann Arbor Charter Twp.*, No. 08-250 (Aug. 25, 2008) (*cert. denied* Dec. 1, 2008); Petition For a Writ of Certiorari, *Agripost, LLC v. Miami-Dade County, Florida*, No. 08-567 (Oct. 27, 2008). There is no reason to expect this trend to diminish because in the

more than 20 years since *Williamson County*, the ripeness rules have been employed to create a byzantine procedural maze, and have transformed the process for vindicating federal constitutional rights into a pleadings game designed to bleed out property owners (who do not pay their attorneys on salary, as municipal governments do) and avoid addressing the merits of takings and other constitutional claims.[5] After more than 80 years of the modern regulatory takings doctrine, the law might be expected to have progressed beyond the issue of whether a complaint states a claim for relief.

For the latest example of the procedural roundabout *Williamson County* has wrought, see *West Linn Corporate Park, L.L.C. v. City of West Linn*, 534 F.3d 1091 (9th Cir. 2008), a case in which the Ninth Circuit, after removal of a regulatory takings claim from state court and trial in federal court, referred the takings issues in the case to the Oregon Supreme Court. Like a good plaintiff is required to do under *Williamson County*, the property owner began its odyssey in state court. It claimed, among other things, that exactions the city imposed on the

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[5] Even though *Williamson County* was based on the text of the Takings Clause, *see Williamson County*, 473 U.S. at 194 ("[T]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation[.]"), some courts apply the doctrine to due process and equal protection claims. *See, e.g., Gamble v. Eau Claire County*, 5 F.3d 285, 286-88 (7th Cir. 1993) (substantive due process); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 369 (9th Cir. 2000) (equal protection).

approval of its development proposals took its property in violation of the United States and Oregon constitutions, and that the city retaliated against it for asserting its constitutional rights.

Despite *Williamson County*'s ripeness requirements, however, the city removed the case to federal court on the basis of federal question jurisdiction. The district court did not question removal because this Court has not yet recognized the asymmetry in the fact that a landowner cannot *institute* a federal takings claim in federal court because there purportedly is no ripe federal question, but the government is free to *remove* a federal takings claim to federal court. *See, e.g., City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) (city removed regulatory takings case to federal court, and neither district court, court of appeals, nor this Court raised *Williamson County* ripeness). After trial in which the district court held partially in favor of the property owner on its inverse condemnation claims and its claims for municipal retaliation, the Ninth Circuit punted the federal takings claims back to state court and certified three questions to the Oregon Supreme Court, where the case now sits. Thus, litigation which was commenced in 2001 in the Oregon courts as *Williamson County* requires, is now – after a federal trial and appeal – back in state court awaiting a determination whether the complaint is valid. *See also Snaza v. City of Saint Paul*, 2008 WL 5085109, at *3 (8th Cir. Dec. 4, 2008) (property owner commenced regulatory takings

claims in state court, and city removed to federal court where it successfully asserted the claims were not ripe). *But see Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031 (E.D. Wis. 2008) (remanding removed case to state court); *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (refusing to remand a case removed by the government because "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith"). In *Yamagiwa*, not only did the city remove the case to federal court, it had the audacity to ask the court after a weeks-long trial which it lost, to dismiss the case since it only could have been brought by the plaintiff in state court – *which it had been*. Such are the arguments *Williamson County* not only allows, but positively encourages.

The final decision rule was not intended to require a search for some metaphysical future time when the government finally admits its decision about the possible uses of the plaintiff's property is utterly and absolutely unchangeable. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986) ("[A] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination[.]") (citing *Williamson County*, 473 U.S. at 205-06 (Stevens, J., concurring)); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 920 F.2d 1496, 1507 (9th Cir. 1990) (reversing trial court's dismissal of claim because city's position was final

enough to make the case ripe for review). Instead, the rule should take into account the reality of the land use planning and entitlement process where development applications are not blindly submitted by property owners, reviewed by government planners, and then either accepted or rejected outright. The land use entitlement process is neither cheap, nor easy. Consequently, property owners most often work with government officials before, during, and after a development application is submitted to tailor the proposal to insure that any government concerns are answered, and to maximize the chances the landowners' desires are met.

Where, as in the case at bar, a property owner submits a detailed development proposal, consults with the government for years, proposes multiple alternatives for development, and the government responds that denial of the application is the "*only* appropriate course," then its denials are final enough for a court to evaluate, and final enough to allow the landowner to get past "Go" and present its case.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests the Court grant the Petition for a Writ of Certiorari.

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Respectfully submitted,

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